* Together with LaJoy v. United States; No. 84
Schang v. United States No. 114

LIBRARY
SUPREME COURT, U. S.

81

APR 6 19
JOHN F. DAVIS, CL

No. ~~1229~~

In the

Supreme Court of the United States

OCTOBER TERM, 1966

GERALD TOMASZCK and
JOSEPH D'ARGENTO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FRANK G. WHALEN
111 West Washington Street
Chicago, Illinois 60602
Attorney for Petitioners
Gerald Tomaszck and Joseph D'Argento

The Scheffer Press, Inc.—ANdover 3-6850

SUBJECT INDEX

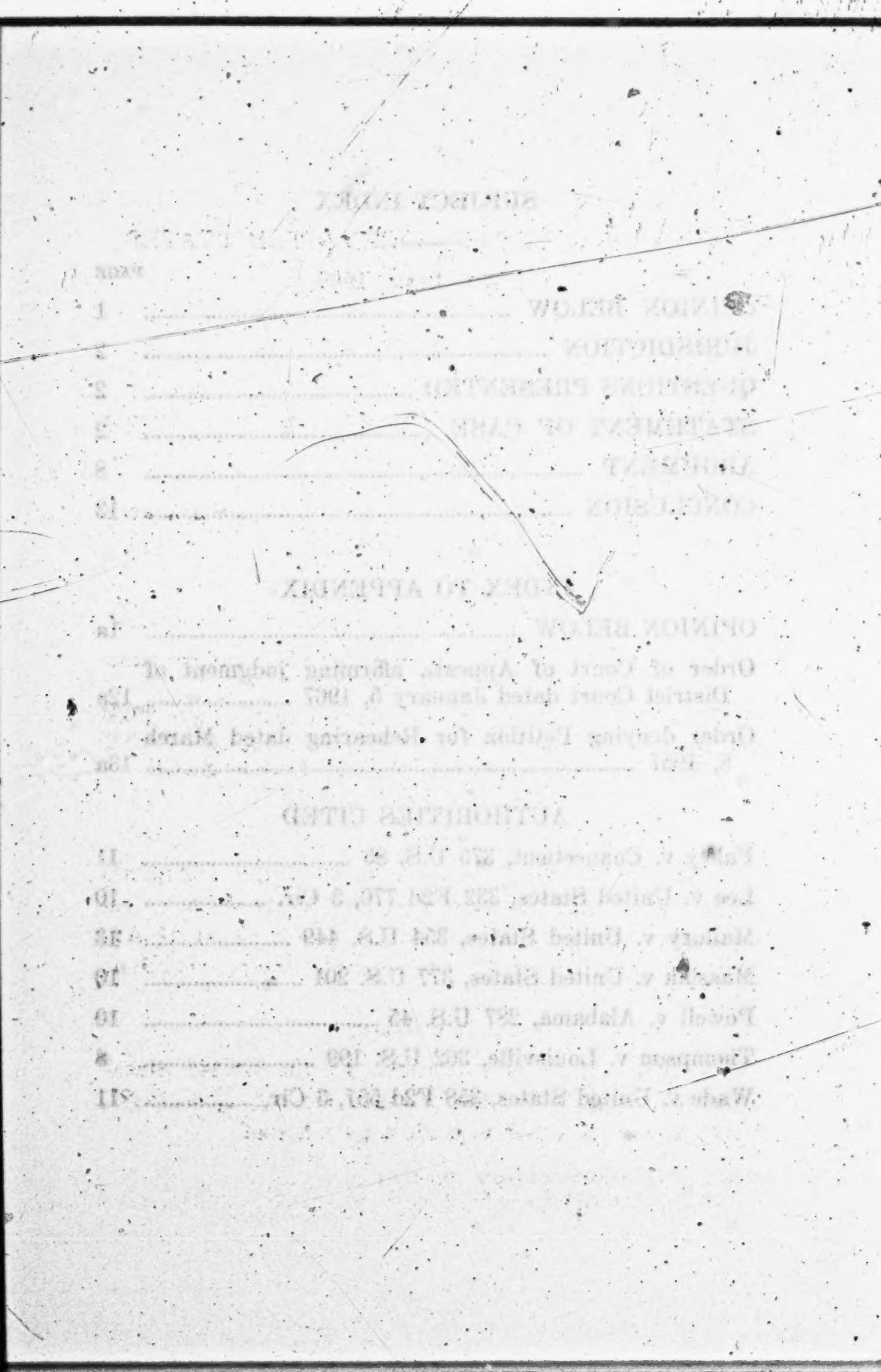
	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF CASE	2
ARGUMENT	8
CONCLUSION	13

INDEX TO APPENDIX

OPINION BELOW	1a
Order of Court of Appeals, affirming judgment of District Court dated January 5, 1967	12a
Order denying Petition for Rehearing dated March 8, 1967	13a

AUTHORITIES CITED

Fahey v. Connecticut, 375 U.S. 85	11
Lee v. United States, 332 F2d 770, 5 Cir.	10
Mallory v. United States, 354 U.S. 449	13
Massiah v. United States, 377 U.S. 201	10
Powell v. Alabama, 287 U.S. 45	10
Thompson v. Louisville, 362 U.S. 199	8
Wade v. United States, 358 F2d 557, 5 Cir.	11



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No.

GERALD TOMASZCK and
JOSEPH D'ARGENTO,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners Gerald Tomaszck and Joseph D'Argento respectfully pray that a writ of certiorari issue to reverse the judgments of the United States Court of Appeals for the Seventh Circuit affirming their convictions for bank robbery.

Opinion Below.

The only opinion is that issued by the United States Court of Appeals for the Seventh Circuit, Nos. 15287, 15289, a copy of which is made a part hereof.

Jurisdiction.

Jurisdiction is invoked on the grounds that the conviction of the defendants Gerald Tomaszck and Joseph D'Argento is in violation of their rights under the due process clause of the Fourteen Amendment and the Sixth Amendment to the Federal Constitution and Title 38, § 1254, U.S.C.A.

The date of the judgments and the time of their entry is March 8, 1967. Petitions for Rehearing were denied March 8, 1967.

Questions Presented.

1. Did the conviction of Tomaszck rest on any evidence at all?—Thus, were the rights of said defendant violated under the due process clause of the Fourteenth Amendment?

2. Did the placing of the defendants in a special show-up following their arrest pursuant to a suppressed indictment violate defendants' rights under the Fourteenth and Sixth Amendments to the Federal Constitution and Rule 9(c), Federal Rules of Criminal Procedure?

Statement of Case.

Defendants Gerald Tomaszck and Joseph D'Argento agree that the factual situation as set forth in the opinion of the United States Court of Appeals for the Seventh Circuit is correct. The following statement of facts is necessary only to give in more detail the exact physical location of the residence located at 3115 Dora Street and the residence of the Government's witness Jean Hauger located at 3101 Sarah Street.

On September 23, 1963, at approximately 11:30 a.m., four masked men entered the Franklin Park bank in Franklin Park, Illinois, robbed the bank, and then entered

an automobile being driven by a fifth man which was parked in close proximity to the bank and made their escape. Shortly thereafter four men were observed getting out of a black Chevrolet in an alley running north and south that separated Dora Street to the west, also running north and south, and Sarah Street to the east, also running north and south, bounded by Minneapolis Street on the south, running east and west, and Belmont Street on the north, running east and west. The car stopped opposite a garage to the rear of 3115 Dora Street which is located on the east side of Dora Street and four doors north of Minneapolis. One man was observed jumping the east fence of the alley and proceeding east. The other three men went west and the car apparently entered the garage on the west side of the alley behind 3115 Dora Street (Bf. 2). The bank is located about a mile and a half—maybe a mile—from this residence.

Government's witness Hauger resided in her home located at 3101 Sarah Street located at the northeast corner of Minneapolis and Sarah Streets which, therefore, lies in a southeasterly direction from the residence at 3115 Dora Street. Close to the noon hour, about 11:45 a.m. (A. 27), or about noon (A. 28), while she was in her kitchen in the southwest part of her home, she saw Tomaszek walk south on Sarah Street in front of her home and then saw him walk in an easterly direction on Minneapolis through the south window of her home. She saw the profile of the man—he was not running or hurrying.

A search of the house at 3115 Dora Street disclosed an M-1 carbine rifle, a pair of gloves and a "Ballantine" carton. In addition the police found a coat, Government's

Exhibit 4, which the Government conceded could only have been worn by the man they contended was Tomaszck (Bf. 9, A. 29, Pet. for Reh. 2-3). Government's Exhibit 9, a raincoat, which the Government conceded could have only been worn by the defendant LaJoy, was found in a backyard east of the alley (A. 29-31).

Government's witness, Police Officer John Hinchy, testified that he had seen defendants Tomaszck and Schang together in a restaurant on July 11, 1962 (more than fourteen months before the crime).

The trial court at the close of the Government's case stated (A. 32):

> "I was concerned throughout the trial about the defendant Tomaszck. You want to go ahead and answer Mr. Whalen?"

and

> "These two, the defendant Tomaszck and the defendant Jean Schang, worry me a great deal, as I have said, I just cannot jump to a conclusion; I just cannot jump. But I do not want to hold up the arguments because I want you to go ahead and make time."

At the close of the Government's case the following colloquy occurred between the attorney for the Government and the Court (A. 29-32):

> "The Court: Mr. Zvetina, isn't is true that the evidence indicates that the person who was allegedly identified by the bank president,—what is his name?
>
> Mr. Zvetina: Mr. Beck.
>
> The Court: Mr. Beck, and he pointed out the defendant Gerald Tomaszck, was standing some eight to nine feet in front of him across the counter—what is the name of it?
>
> Mr. Zvetina: No. 8.

The Court: No. 8 did not wear a raincoat?

Mr. Zvetina: Oh, there is no question about that, your Honor. The raincoat was placed on a man near the door, the shorter man.

The Court: Yes. And isn't it true that your circumstantial set of facts, assuming them to be true as Mr. Whalen has said—

Mr. Zvetina: Yes?

The Court: As relating to Tomaszek as being the same person who was seen crossing in front of the kitchen of Mrs. Smith and cutting across around the corner of the yard of Mr. Hauger, relates to the raincoat that was found in the yard?

Mr. Zvetina: Not necessarily, your Honor.

The Court: And would naturally have to have been that which was worn by Mr. Tomaszek?

Mr. Zvetina: No, your Honor. First of all, it must be recalled, the circumstances that are significant is where these items were found.

Now, as counsel correctly pointed out, Leonard Wood testified that one man went over a fence to the east.

Officer Warfield testified to finding the raincoat, gloves, and the silver .25 caliber in the pocket near the fence. This is in the back of the yard, near the fence.

The coveralls with another gun, a loaded .38—and certainly we don't assume that one individual was packing two guns—the loaded .38 and the coveralls were found out between the houses towards the front. You remember, there was an evergreen bush or something out towards the front of 3114. And he found the coveralls and the loaded .38 up by the bush towards the front of 3114 between the houses."

"The Court: According to your theory of the evidence, who was whom?

Mr. Zvetina: According to our theory of the evidence, the man who went over the fence—

The Court: Who was whom in the bank?

Mr. Zvetina: Well, according to the testimony, your Honor, the man who stood in front of the counter resembled in stature and posture and glasses the defendant Tomaszck.

However, I don't think it is 100 per cent essential that we identify who was who in the bank.

The Court: Who stayed at the door?

Mr. Zvetina: Defendant LaJoy. All the testimony would indicate that the short man, the short man approximately my height, was the man near the door. He had the raincoat and some sort of a hat.

The Court: And if he had the raincoat, why would the raincoat not have been found in the house rather than behind the bushes going in the other direction?

Mr. Zvetina: Assuming, your Honor, this was a casual affair when they arrived at the scene, this would have been likely. All this incriminating evidence would never have gotten outside the house. They all would have gone in and undressed calmly.

But here we have a panic situation, and obviously, the leaving of coveralls or raincoat with a loaded gun is not the kind of thing that a criminal would normally do unless there were some kind of a panic situation. He is not going to leave this around out in the open to be found.

This is like jettisoning something from a sinking ship. And you just heave it over.

The Court: Who picked up the raincoat and went out the other direction with it while Mr. LaJoy allegedly—

Mr. Zvetina: Nobody did.

The Court: —was seen coming out of the house, out of the—

Mr. Zvetina: Nobody did, your Honor. It is our theory, you will recall that Wood testified the car pulled in the alley going rapidly, the car stopped and then went quickly into reverse; people are scattering from the car. He sees one man go over the fence to the east. But there is certainly nothing to prevent someone from jettisoning his coat with the guns and gloves.

The Court: Who did that?

Mr. Zvetina: Well, I don't know who actually did it, your Honor.

The Court: You have just so many men. Three of them came out of the house.

Mr. Zvetina: Yes, your Honor."

Two alibi witnesses testified on behalf of Tomaszck.

On September 26 the suppressed indictment was returned, on September 27 at 4:00 a.m. the agents arrested Tomaszck and left his home (A. 3-4), at 8:45 a.m. they arrived at the FBI Headquarters (A. 6), at 9:30 a.m. Tomaszck's attorney called the FBI Headquarters and demanded to see him (A. 12)—the agent admitted receiving the call at that time but had no recollection of the demand to see Tomaszck (A. 16). Joseph D'Argento was arrested in his home at about the same time. At 9:57 or 9:58 a.m. Tomaszck and D'Argento were placed in a showup (A. 5). Witness Hauger was present. Tomaszck and D'Argento were required to repeat the following phrases: "This is a stickup," "Get down on your knees," "Where's the money," and two more phrases (A. 5).

ARGUMENT.

I.

THERE WAS NO EVIDENCE AT ALL TO CONVICT TOMASZCK—THUS, HIS RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WERE VIOLATED.

A conviction resting on no evidence at all violates defendant's rights under the due process clause of the Fourteenth Amendment, *Thompson* v. *Louisville*, 362 U.S. 199.

Defendant Tomaszck was not identified as being in the bank, leaving the bank, getting in the get-away car, being in the get-away car, or getting out of the get-away car, nor were any proceeds of the robbery found on his person. The trial court's grave concern about whether his case should go to the jury was well justified (Pet. for Cert. 4).

Defendant Tomaszck was seen entering a restaurant with a co-defendant more than fourteen months before the crime was committed (Pet. for Cert. 4). He was also observed walking south on the east side of Sarah Street and then east on the north side of Minneapolis by a resident residing at the northeast corner of Sarah and Minneapolis close to the noon hour, about 11:45 a.m., or about noon, on the day of the crime. Defendant Tomaszck submits that this testimony standing alone has no probative value, and this is all the testimony that could possibly link this defendant with the bank robbery.

There was no evidence upon which a conviction could rest. The Government, however, did have a theory—a

theory that puzzled the trial court (Pet. for Cert. 4-7). The Government theorized that since (1) the automobile apparently used in the robbery entered the alley that separates Sarah and Dora Streets and came to a stop at the rear of 3115 Dora Street, and (2) an unknown man was observed getting out of the automobile and jumping the fence at the east side of the alley, and (3) Tomaszck was seen in front of the northeast corner of Sarah and Minneapolis, that Tomaszck is the same man that got out of the automobile.

This theory, however, was refuted by the Government's own exhibits. Government's Exhibit 9, a raincoat, which the Government conceded could only have been worn by defendant LaJoy (A. 29-31) was found in the yard east of the alley and to the rear of 3115 Dora into which an unidentified man having left the car had entered. A search of the home at 3115 Dora revealed, in addition to articles mentioned in the opinion of the Court of Appeals, Government's Exhibit 4 which was not mentioned in the opinion. This omission was called to the Appeals Court's attention in Tomaszck's Petition for Rehearing. The Government admitted that Government's Exhibit 4 could only have been worn by Defendant Tomaszck.

There was no evidence at all to convict Tomaszck.

II.

THE COMPULSORY EXHIBITION OF THE PERSONS AND VOICES OF DEFENDANTS TOMASZCK AND D'ARGENTO IN A LINEUP FOLLOWING A SUPPRESSED INDICTMENT PURSUANT TO THE GOVERNMENT'S PLANS TO CONDUCT IT SO THAT ATTORNEYS WOULD NOT BE GIVEN AN OPPORTUNITY TO ATTEND VIOLATED DEFENDANTS' RIGHTS TO THE EFFECTIVE AID OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

The argument is twofold. First, it violates the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crime condemned in *Massiah* v. *United States,* 377 U. S. 201, 205. Second, in this particular case counsel could have rendered effective aid that was lost forever to these defendants. At the lineup some of the witnesses picked out agents in the lineup as having similarities to the persons that they associated and connected with the robbery of the Franklin Park bank (A. 17). During the trial defendants' requests for the names of these witnesses were denied by the Court (A. 17). A written motion filed by the defendants for the names of these witnesses was also denied by the Court. Defendants were thus deprived of useful testimony. An attorney could well have obtained the names of these witnesses if he were present. The right of counsel extends to the preparation for trial as well as the trial itself, *Powell* v. *Alabama,* 287 U. S. 45. The constitution gives a defendant the absolute right to counsel starting no later than after his indictment, *Lee* v. *United States,* 322 F. 2d 770, 778, 5 Cir. (1963).

There was a reasonable possibility that the viewing of the persons and the hearing of the voices of the defendants at the lineup might have contributed to the convictions and

the error therefore was not harmless, *Fahey* v. *Connecticut*, 375 U. S. 85; *Wade* v. *U. S.*, 358 F2d 557, 5 Cir. Jean Hauger is the only witness upon whose testimony Tomaszck's conviction could possibly rest. Between 11:45 a.m. and 12:00 p.m. she did see a man walking south on Dora, on the east side of Dora, in front of her house who was not walking hurriedly (A. 27-28). She then saw this man walk east on Minneapolis while she was preparing lunch and only saw the profile of the man (A. 28). The following day when shown pictures of Tomaszck by agents she could not describe, she said that the pictures resembled the man she saw walking by her home (A. 28). While being transported to the showup four days later she was told by the agents that arrests had been made and she might have been told that some people were indicted (A. 28). She then identified Tomaszck at the showup as the man she saw walking by her home. D'Argento's conviction rested upon testimony of witnesses who attended the lineup. Government witnesses testified as follows: William Tamir—D'Argento resembled one of the robbers he saw in the bank; Mrs. Sampson—D'Argento looked like one of the men who left the house at 3115 Dora but she could not positively identify any of the men and that she had seen pictures of the defendants in the newspaper after the return of the indictment; Parker—she saw D'Argento running through her backyard across the street from 3115 Dora and that he had a scar as big as a thumbnail on his face.

III.

THE FAILURE OF THE AGENTS TO BRING TOMASZCK AND D'ARGENTO PROMPTLY BEFORE THE COURT VIOLATED RULE 9(c), FEDERAL RULES OF CRIMINAL PROCEDURE.

The agents entered Tomaszck's home at 4:00 a.m. on September 27, 1963, and he was immediately placed under

arrest. They left the house about 8:00 a.m. (A. 3). They arrived at the Bureau Headquarters about 8:45 a.m. (A. 6). The showup lasted from 9:57 - 9:58 a.m. until about 10:25 a.m. (A. 5). The procedure was about the same for D'Argento.

Rule 9(c), Federal Rules of Criminal Procedure provides that the officer executing the warrant shall bring the arrested person promptly before the court, or for the purpose of admission to bail, before a commissioner. Bail having already been set in the indictment there remained only the duty to bring the defendants promptly before the court.

Research has failed to disclose a single case interpreting Rule 9(c) where the arrest is pursuant to a suppressed indictment.

"Promptly" is an adverbial form of the word "prompt" which means ready and quick to act as occasion demands, Black's Law Dictionary, P. 1379. The same work defines "prompt" as follows: to act immediately, responding on the instant. There was a definite reason to use the word "promptly" in the rule. In Rule 5(a), Federal Rules of Criminal Procedure, referring to the situation where an arrest is made without a warrant or under a warrant issued upon a complaint, the person making the arrest "shall take the arrested person without unnecessary delay before the nearest available commissioner;" that the reason Rule 5(a) provides for some delay is that probable cause has not been determined as yet, and some delay may very well be for the benefit of the arrested person. However, where a man has been indicted the issue of probable cause has already been determined; that any delay is not for the benefit of the arrested person, and it thereupon becomes the duty of the agents to take the arrested person promptly

without any delay to the court under Rule 9(c), Paragraph (1).

The rights of the defendants were violated. The court should apply an exclusionary rule against all persons appearing at the showup from testifying at the trial, *Mallory* v. *United States*, 354 U. S. 449 (1957).

CONCLUSION.

For the reasons advanced defendants Gerald Tomaszck and Joseph D'Argento request that the judgments entered be reversed or, in the alternative, that they be reversed and the cause remanded for a new trial.

Respectfully submitted,

FRANK G. WHALEN
111 West Washington Street
Chicago, Illinois 60602.

Attorney for Petitioners
Gerald Tomaszck and
Joseph D'Argento

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1966—JANUARY SESSION 1967

Nos. 15287, 288, 289 and 290.

UNITED STATES OF AMERICA,
Appellee,
v.
JOSEPH D'ARGENTO, MIKE LAJOY, GERALD TOMASZCK AND PATRICK SCHANG,
Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 5, 1967

Before DUFFY, *Senior Circuit Judge,* KNOCH AND CASTLE, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* After trial by jury, all defendants except Jean Schang were found guilty of violation of Title 18, U.S.C. § 2113 (Bank Robbery Statute). Defendant Jean Schang was charged with aiding and abetting the other defendants, but the jury found her not guilty.

Three groups of attorneys have and do represent one or more of the various defendants. All of the attorneys urge that the evidence was insufficient to sustain the guilty verdicts against their clients. All of them further contend that a lineup or showup conducted by agents of the Fed-

eral Bureau of Investigation resulted in violations of the Fifth Amendment prohibition against compulsory self-incrimination, and the Sixth Amendment right to counsel.[1] These issues make necessary a somewhat detailed description of the bank robbery and events occurring shortly thereafter; also a description of the manner in which the lineup was conducted.

Evidence received at the trial disclosed that on September 23, 1963, at approximately 11:30 a.m., four masked men entered the Franklin Park bank in Franklin Park, Illinois. The number 1 man stayed near the front door of the bank. He wore coveralls, a long coat and he had a head covering on his head over a mask. The bank president, Mr. Beck, testified this man weighed 150 to 160 pounds, was 5′ 6″ to 5′ 8″ in height, and was of solid build and stature.

The number 2 man leaped over a railing and entered cages 8 and 9, passing closely by the bank president. This man shouted directions such as "Stay where you are," "stand still," and "don't move." The number 2 man was well built, about 6′ tall and weighed about 200 pounds. As did the others, he wore a mask of T-shirt material with slits cut out over the eyes; he also wore dark gloves, one-piece coveralls, carried a revolver and also a cardboard carton upon which the name "Ballantine" appeared. This man took money from the cash drawers and placed it in the carton. The number 2 man then moved to other cages and gave directions such as "Get down on your knees" and "Cover your eyes."

The number 3 man was in the tellers' area behind the cages. He wore a coverall and a hood. The number 4 man was standing ten to twelve feet from where president Beck was standing. He was described as 5′ 10″ or 11″ in height, and weighing from 175 to 180 pounds. He wore a one-piece coverall, a light tan jacket and a tightly fitted mask. He

---

[1] The defendant Patrick Schang was not arrested at the same time as the other defendants, and did not participate in the lineup. Therefore, no argument with respect to the lineup is made on his behalf.

also wore dark colored gloves and held a revolver. Witnesses noted that this man had an unusual posture, holding his head in a forward position with his chin jutting out.

The robbers obtained $43,000 in cash, and as the four men were running away from the bank, they got into a black 1963 two-door Chevrolet Impala driven by a fifth man. An employee of the bank had alerted the local police and as the robbers drove away, they were followed in hot pursuit by two police cars. During the chase, one of the police officers observed two flashes from the back window of the Chevrolet, and noted that the window broke out. After following the get-away car for a short distance, the police lost sight of it.

Shortly thereafter, four men were observed getting out of a black Chevrolet automobile in an alley which ran in a northerly and southerly direction, and which separated Dora Street and Sarah Street. The automobile stopped opposite a garage at the rear of 3115 Dora Street. One man was observed jumping over the east fence of the alley and proceeding eastward; the other three men went in a westerly direction and entered the garage on the west side of the alley at 3115 Dora Street.

The black automobile continued westerly at a high speed. However, a short time thereafter, two police officers of the Franklin Park Police Department discovered a black 1963 Chevrolet automobile in the garage at the rear of 3115 Dora Street, the rear window of which was shattered. Two workman's caps, a used M-1 carbine shell and a white T-shirt with slits cut out were among the artieles found in the automobile. (A search of the house at 3115 Dora Street disclosed an M-1 carbine rifle, a pair of gloves and a "Balantine" carton.)

A brown coat containing a 25 caliber automatic pistol, a jacket and a pair of brown cotton gloves were found in a neighboring back yard. In front of the house at 3115 Dora Street, coveralls were found containing a .38 caliber snubnose revolver.

The residence at 3115 Dora Street was owned by Frank DeLegge, an uncle of the defendant LaJoy. A neighbor, Mrs. Sampson, upon hearing a screeching noise from outside, ran out of her house. She heard a door on the house at 3115 Dora Street close, and saw three men in the driveway. She identified one of them as LaJoy. She had seen him there previously on five different occasions. She also identified defendants Joseph D'Argento and Patrick Schang as being in the driveway at that time.

FBI agent Green testified he was the agent in charge of the investigation of the Franklin Park bank robbery. Between 3 p.m. and 5 p.m. on September 23, 1963, he was officially informed that warrants had been issued for the arrest of each of the defendants pursuant to an indictment which had been returned earlier that day. Plans were made by the FBI for a coordinated, simultaneous arrest of all of the defendants in their homes at 5 a.m. the next day. The agents were further instructed to make a search incidental to such arrests. Plans also were made for a lineup in which the participants would be asked to repeat certain phrases and words that had been used by the robbers during the bank robbery.

The lineup was held in an ordinary large room in the FBI office with normal hanging ceiling fluorescent light fixtures. The rear lights were turned off and the front lights turned on so that the people in the lineup would not be able to clearly see the witnesses attending the lineup. Two separate lineups involving two different groups of witnesses were carried on so that the witnesses might be kept separate and not able to communicate with one another or observe what another witness might have written on the piece of paper.

Defendants LaJoy, Tomaszek and D'Argento took part in the lineup on the morning of September 27, 1963. The lineup started functioning about 10 a.m. Eighteen possible witnesses observed the lineup. Prior to viewing the persons in the lineup, the witnesses were informed they were going to observe a group of individuals. They were not

told the names of the persons they would view, or their backgrounds.

Each person in the lineup was numbered. Three of the eight people in the lineup were defendants in the instant case. The other five were FBI agents or employees. Some of the FBI employees were attired similarly to the defendants. The witnesses were kept separated and were not permitted to communicate with one another. The witnesses were told that if they recognized any of the persons or the characteristics of any of the persons in the lineup, in any way, they should write down on a piece of paper the number of such person. They were also informed they would later be interviewed by the FBI agents concerning the number or numbers of the persons they had written down.

No names were used in addressing the participants in the lineup. They were addressed by their number only. Each man in the lineup was required to make statements in regular order beginning with No. 1. Each man stepped forward as he repeated various phrases. All of the persons in the lineup did this. The commands of the FBI agent were in the same tone of voice as to each person.

The holding of the lineup as hereinbefore described is the basis of the claim by defendants LaJoy, Tomaszck and D'Argento, that their rights to be protected against compulsory self-incrimination were violated. Defendant LaJoy states the issue as follows: Compelling the defendant Mike LaJoy, "after indictment, to exhibit himself and utter certain phrases in a lineup or showup . . . violates the Fifth Amendment's prohibition against compulsory self-incrimination, and any evidence derived therefrom is tainted and should be excluded."

The Government's position is that placement of a defendant in a lineup, whether or not he is required to speak words used by the perpetrator of the crime, is clearly not testimonial compulsion as prohibited by the Fifth Amendment to the Constitution. We agree with this view.

The courts have, quite generally, regarded a lineup as being a valid police procedure. In *United States* v. *Evans*,

3 Cir. (1966), 359 F.2d 776, a bank robbery case, it appeared a witness had identified the defendant in the lineup. The defendant was required to submit to the viewing at a time when he was already incarcerated on a different charge. The Court held the defendant was not deprived of any constitutional right even though defendant was required to wear sun glasses as did the robber during the holdup. The opinion cited and followed the decision in *Rigney* v. *Hendrick*, 3 Cir. (1965), 355 F.2d 710, cert. den. 384 U.S. 975, where it was stated, p. 714—"We have found that the lineup procedure is both reasonable and consistent with the rules of fundamental fairness."

In *Schmerber* v. *California* (1966), 384 U.S. 757, the Supreme Court affirmed the right of the State of California at the direction of one of its police officers and over the objection of a defendant charged with driving an automobile while intoxicated, to withdraw at a hospital, a sample of his blood which was analyzed. The results of such analysis were introduced as evidence at his trial. This blood sample was withdrawn after Schmerber, acting upon advice of counsel, had refused to permit such withdrawal. The defendant strongly urged that such conduct violated his privilege against self-incrimination as secured to him against the states by the due process clause of the Fourteenth Amendment. The Supreme Court stated, at page 764: ". . . both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." (Footnote omitted.)

In his discussion of the privilege against self-incrimination Wigmore suggests the privilege is limited to testimonial disclosures. 8 Wigmore, Evidence, § 2263 (McNaughton rev. 1961). Wigmore further indicates the following situations, among others, are not within the scope of the protection under such privilege: requiring a person to write for identification; to appear in court; to assume a stance; to walk or make a particular gesture; to speak

for identification even though such evidence can only be obtained with the cooperation of the defendant. *Id.* § 2265. These sections of Wigmore were cited by the Supreme Court in *Schmerber* v. *California, supra.*

In *Caldwell* v. *United States,* 8 Cir. (1964), 338 F. 2d 385, cert. den. 380 U. S. 984, which was a bank robbery case, the defendant argued that being placed in a lineup violated his privilege against self-incrimination. The Court there was not faced with the additional issue of the defendant being required to repeat words or phrases. However, the language of the Court is significant. The Court said, page 389: "The mere viewing of a suspect under arrest by eye-witnesses does not violate this constitutional privilege because the prisoner is not required to be an unwilling witness against himself. There is a distinction between bodily view and requiring the accused to testify against himself."

The evidence hereinbefore quoted, demonstrates that the lineup at which defendants LaJoy, Tomaszek and D'Argento appeared, was fairly conducted and we hold that by reason thereof there was no violation of the Fifth Amendment's prohibition against compulsory self-incrimination.

The second principal contention of defendant LaJoy[2] is that compelling him, after indictment, to exhibit himself in the lineup in the absence of his attorney or his express consent, violates his constitutional right to be represented by counsel as guaranteed by the Sixth Amendment. He relies upon *Massiah* v. *United States* (1964), 377 U.S. 201; *Escobedo* v. *Illinois* (1964), 378 U.S. 478, and *Wade* v. *United States,* 5 Cir. (1966), 358 F.2d 557.

There certainly was no disposition on the part of the FBI agents to prevent any of the defendants from contacting counsel. Prior to the lineup, defendant D'Argento was assisted by agent McLean in placing a telephone call to his attorney. Likewise, Mrs. Schang was assisted by an FBI agent in her attempt to call an attorney after she told

---

[2] This defense is adopted by defendants Tomaszek and D'Argento.

him the attorney's name at her home that morning. Defendant Tomaszek, upon being informed of his rights, indicated it was too early to call an attorney and upon leaving his home, requested his wife to do so.

In *Williams* v. *United States,* DC Cir. (1965), 345 F.2d 733, cert. den. 382 U.S. 962, the defendant was convicted of robbery and assault with a dangerous weapon. He was identified by three witnesses in a police lineup held shortly after the commission of the crimes and at a time when he was without counsel. The Court stated that although the lack of assistance of counsel had been held fatal to conviction in a variety of circumstances including *Escobedo* v. *Illinois, supra,* and *Massiah* v. *United States, supra,* the *Williams* case did not resemble factually those cases. The Court said, page 734: "In the present case, especially in view of the fact that the evidence referred to consisted only of identification in a police lineup prior to indictment, the deprivation claimed cannot be held to have occurred."

Judge Burger wrote a concurring opinion in which he discussed the *Escobedo* holding, and concluded that a police lineup is not the type of interrogative activity forbidden by *Escobedo.*

In *Kennedy* v. *United States,* DC Cir. (1965), 353 F.2d 462, the defendant insisted his Sixth Amendment right to counsel was violated as he was without counsel when identified at the scene of the robbery. Judge Burger wrote the majority opinion and rejected an absolute mechanical application of the *Escobedo* rule which, in his judgment, is directed to police efforts to elicit a confession from a defendant without counsel being present.

Counsel for defendant LaJoy relies heavily on *Wade* v. *United States,* 5 Cir. (1966), 358 F.2d 557.[3] However, in *Wade,* there are significant differences from the case at bar. Wade had been indicted for conspiracy to rob a federally insured bank. Counsel had been appointed for him at least two weeks prior to the lineup. It was six months

[3] The Supreme Court has granted certiorari in the *Wade* case and it is pending as No. 334, October Term 1966.

after the robbery that the lineup occurred. No notice of the lineup was given to Wade's attorney. Just before the lineup was conducted, Wade was observed by two lineup witnesses in the custody of an officer. The Court posed the issue thus, at page 559: "It becomes necessary, therefore, only to determine here whether requiring Wade to submit to a lineup of the character that has been depicted above in the absence of counsel already assigned to him, deprived him of the aid of counsel at a critical state of the prosecution. . . ."

In *Wade,* Chief Judge Tuttle who wrote the majority opinion, referred to *United States ex rel Stovall* v. *Denno,* 2 Cir. (1966), 355 F.2d 731, and stated at page 559: "We find no reason to express a contrary conclusion so far as relates to the ordinary police lineup which is carried out under conditions which permit the greatest objectivity of viewing the accused with others who are exhibited with him."

In the instant case, the FBI went to great lengths to insure the fairness of the lineup procedure. Each defendant was advised of his rights and given the opportunity to obtain counsel. The lineup was held promptly on the day of the arrest, and thereafter, about thirty minutes from the time that the federal courts in Chicago were open for business, the defendants were turned over to the United States Marshal prior to being brought before a judge for the purpose of arraignment.

In *Gilbert* v. *United States,* 9 Cir. (1966), 366 F.2d 923, the defendant argued that he had a right to counsel before being required to participate in the lineup. After referring to defendant's reliance on *Massiah, Escobedo* and other cases, the Court said, page 940: "We think it clear that the foregoing cases do not require a holding that Gilbert had a right to consult counsel before being placed in a lineup, or to the presence of counsel at a lineup." We agree.

Defendants LaJoy, Tomaszek and D'Argento all complain that they were deprived of due process because, they say, the arresting agents failed to promptly bring them

before the Court, or for the purpose of admission to bail, before a Commissioner, in compliance with Rule 9 (c), F.R.Cr.P.[4]

It should be noted that the indictment, by order of the District Court, was suppressed together with the warrants. Bail had been set for each defendant at $50,000. It was, therefore, unnecessary to bring the defendants before a court commissioner.

The delay of which defendants complain is the period from the time of the arrests at approximately 5 a.m. to about 10:45 or 11:00 a.m. when they were turned over to the United States Marshal to be brought into court.

After the arrests, a substantial period of time was spent in searching the premises incident to such arrest, preparing receipts for all items tagen in the search, allowing the defendants to shave and dress, and transporting them from their homes to the FBI office. LaJoy and Tomaszck arrived there at about 8:45 a.m. D'Argento had arrived earlier and had been given coffee and a roll. All were fingerprinted and photographed. The lineup was held from 9:57 to 10:25 a.m.

During the period of which defendants complain, no confessions were made; no attempt was made to obtain confessions or statements from the defendants. We hold there was no unreasonable delay and that the defendants were not deprived of due process.

We reject the contention of each defendant that the evidence was insufficient to support the verdicts of the jury. We hold that the evidence, viewed in the light most favorable to the Government, supports the conclusion reached by the jury as to the guilt of all of the defendants.

Defendants LaJoy, Tomaszck and Schang produced alibi witnesses at the trial. It was the jury's duty and not ours to weigh the conflicting testimony.

---

[4] Rule 9 (c) provides that ". . . The officer executing the warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a Commissioner."

Defendant LaJoy complains that the court erred in failing to give requested instruction "T."[5] He claims that in a colloquy (not found in the record on appeal), the Court indicated it would give such instruction, but that the Court did not inform counsel that such instruction would not be given until after the completion of the oral arguments.

Rule 30, F.R. Cr. P. does provide that the Court shall inform counsel of its proposed action upon request for instructions prior to the argument to the jury. However, we do not regard this failure in the instant case as reversible error in view of the Court's instruction which was given and which was based upon the Standard LaBuy instruction 6.04 relating to direct and circumstantial evidence. We think the jury was sufficiently and properly instructed.

The defendants have raised additional questions which we have carefully considered. We think these contentions are without merit and do not warrant further detailed discussion.

The judgment of conviction and sentence entered by the District Court with respect to each of the defendants is

AFFIRMED.

---

[5] The requested instruction read as follows: "You may not draw any inference of guilt from any circumstance unless you have found that circumstance to be a fact proved beyond a reasonable doubt by the evidence."

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Thursday, January 5, 1967

Before

Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 15287, 88, 89, 90 *vs.*
JOSEPH D'ARGENTO, MIKE LAJOY, GERALD TOMASZCK and PATRICK SCHANG,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of conviction and sentence entered by the said District Court with respect to each of the defendants be and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago, Illinois 60604

Wednesday, March 8, 1967

Before

Hon. John S. Hastings, *Chief Judge*
Hon. F. Ryan Duffy, *Senior Circuit Judge*
Hon. Elmer J. Schnackenberg, *Circuit Judge*
Hon. Win G. Knoch, *Circuit Judge*
Hon. Latham Castle, *Circuit Judge*
Hon. Roger J. Kiley, *Circuit Judge*
Hon. Luther M. Swygert, *Circuit Judge*
Hon. Thomas E. Fairchild, *Circuit Judge*
Hon. Walter J. Cummings, Jr., *Circuit Judge*

United States of America,
Plaintiff-Appellee,

No. 15287, 15288, 15289 and 15290 *vs.*

Joseph D'Argento, Mike LaJoy, Gerald Tomaszck and Patrick Schang,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

All active Judges of this Court and Senior Judge Duffy have voted to deny the petitions for rehearing en banc filed herein.

Therefore, It Is Ordered by the Court en banc and Senior Judge Duffy that the petitions for rehearing en banc filed herein by the defendants-appellants, Joseph D'Argento, Mike LaJoy, Gerald Tomaszck and Patrick Schang, be, and the same are hereby Denied.

SUPREME COURT, U. S.

No. ~~1204~~ 84

APR 7 1967

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

MIKE LA JOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MAURICE J. WALSH
29 S. LaSalle Street
Chicago, Illinois 60603
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 12, ILL. LA review 5-6581

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Federal Rules of Criminal Procedure Involved 3

Statement of the Case 4

Reasons for Granting the Writ 15

Appendix

A. Opinion of the United States Court of Appeals for the Seventh Circuit ..... App. 1

B. Order denying Petitions for Rehearing ..... App. 14

Cases Cited

Escobedo v. Illinois, 378 U.S. 478 21

Gilbert v. California, No. 223, 63 A.C., 722 California Sup. Ct. 15, 21

Mallory v. United States, 354 U.S. 449 21

Massiah v. United States, 377 U.S. 201 21

Stovall v. Denno, No. 254, C.A. 2, 355 F.2d 731 ..... 15, 21

United States v. Wade, No. 334 Case Below, C.A. 5, 358 F.2d 557 ..... 15, 21

Constitutional Amendments

Fifth Amendment 2

Sixth Amendment 2

Eighth Amendment 3, 15

Rule cited

Rule 9 of the Rules of Criminal Procedure 2, 3, 15, 16, 18

In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

MIKE LA JOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Mike LaJoy respectfully prays that a writ of certiorari issue to review the judgment of the Seventh Circuit entered in the above case on January 5, 1967.

OPINIONS BELOW

The opinion of the Court below (Appendix A, page App. 1) is not yet reported. The District Court did not write or hand down any opinion.

JURISDICTION

The judgment of the Court below was entered on January 5, 1967 (Appendix A, p. App. 1). Petition for rehearing by the petitioner was denied March 8, 1967 (Appendix B, p. App. 14). This petition for certiorari is filed within thirty days of the denial of the petition for rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Was it not error to deny the motion to suppress evidence secured by compelling the petitioner, Mike LaJoy, after indictment, and without counsel, to exhibit himself and utter and repeat incriminating phrases in a line-up or show-up held in the F.B.I. headquarters, under a plan by the agents and the prosecutor, at the very time that he was required to be produced before the District Court or a Commissioner under the provisions of Rule 9(c) of F.R.Cr.P.? And was it not error to admit tainted evidence of voice identification derived therefrom as crucial evidence on trial in violation of the Fifth Amendment's prohibition against self-incrimination?

2. Did compulsory exhibition of petitioner Mike LaJoy's physique and voice in said line-up or show-up after indictment, without consultation with any attorney, or the petitioner's expressed consent, violate his Constitutional right to be assisted by counsel at all times in the accusatory stage, *i.e.*, after indictment, as guaranteed by the Sixth Amendment?

3. Did compulsory exhibition of petitioner Mike LaJoy's physique and voice in said line-up or show-up after indictment, in the absence of his attorney, or his expressed con-

sent, and after bail on the indictment had been set for him, but no opportunity to arrange or furnish said bail was afforded, (nor was petitioner informed of the bail set), violate and nullify the petitioner's right to bail under the Eighth Amendment?

4. Do not the technique of using the suppression of an indictment returned on the third day after the bank robbery charged, and a search and seizure in the petitioner's home under the form of a search incidental to an arrest, executed at 5:00 A.M. the morning following return and suppression of the indictment, and the compulsory custody for six or seven hours of interrogation and exhibition, with required speech, of the petitioner to persons, one of whom became crucial witness against him at trial on voice identification, at the very time that the District Court opened for business and should have had the petitioner presented before a judge thereof, in conformance with Rule 9(c) of F.R.Cr.P., require examination by this Court and the exercise of its supervisory powers in accordance with decisions reversing convictions where planned, unlawful, or extended custody in violation of law was condemned, and evidence secured thereby was excluded, and judgments of conviction reversed?

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 9. *Warrant or Summons upon Indictment or Information.*

(a) *Issuance.* Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment.

* * *

(c) *Execution or Service; and Return*

(1) *Execution or Service.*

* * *

* * * The officer executing the warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a commissioner.

STATEMENT OF THE CASE

This is the Petition for Certiorari by Mike LaJoy seeking review of the affirmance of a judgment on a verdict of guilty by a jury and a sentence to fifteen years imprisonment upon an indictment charging bank robbery and putting in jeopardy the lives of employes and customers by use of a dangerous weapon, to wit, a firearm, (Tr. 5).

For inability to print the record for lack of funds, the Court of Appeals ordered that the parties could proceed on the official transcript and record of the District Court.

A Motion to Suppress evidence was filed by the petitioner addressed, as amended, to the suppression of evidence secured by the arrest of the petitioner at his home at 5:00 A.M. on the fourth day after the bank robbery charged under the claim of process to be issued on a suppressed indictment returned late on the preceding day, and on which bail was set at fifty thousand dollars. No official reason was recorded for suppression of the indictment.

Since this Petition is concerned with events and evidence secured on the morning after return of the indictment, the petitioner states the evidence on the motion as it was described by the Government Brief in the Court of Appeals, pages 20-23, 34-37, and 38. The testimony or evidence of witness Sanders' recognition of a similarity be-

tween the voice he remembered from the holdup, and LaJoy's voice as he heard it on commands by F.B.I. agents is described in the Government Brief at page 7 thereof.

The government version of these events is adopted to avoid argument on facts and because of the inability to print the testimony.

THE TESTIMONY OF SANDERS, P. 7 GOVERNMENT BRIEF

Sanders, vice-president and cashier of the Franklin Park Bank, was standing near the switchboard area located in the vicinity of the entrance to the bank between 11:30 and 11:40 A.M. when he heard the words "Everybody down" shouted. He then turned and observed two men leap over the railing and proceed into the tellers' cages. Both were dressed in coveralls and carried boxes. The first of such men whom he observed more closely than the second was about 6 feet tall, 190 pounds, had a mask over his face, carried a bright gun, and on the side of the box he carried he noted the word "Ballentine". The first man entered the area of tellers' cages 8 and 9, the other went further on toward the back of the bank. f.r.37. Sanders then moved into an aisle, and looking directly south saw a man standing near the doors to the entrance of the bank. f.r.38. This man was about 5′ 7″ or 5′ 8″ tall, heavier than average build, wore a mask, a dark raincoat, and a medium colored hat, and was carrying a gun. This man took several steps toward Sanders until he was 5 or 6 feet away and said several times, "Down, down, all the way down" in a voice Sanders could not forget, whereupon Sanders knelt down on the floor with his head facing down towards the floor. He then heard a

voice coming from the area of the entrance of the bank shout "Time is up". When he arose, the robbers were gone. f.r.39. Sanders subsequently attended the lineup at the offices of the Federal Bureau of Investigation on September 27, 1963 and picked out the defendant LaJoy as resembling in physical stature and voice the man he observed at the door who told him to get down. f.r.40.

Sanders further stated that in the performance of his duties, he determined that the amount taken in the robbery was $43,097.00 f.r.41. Mr. Sanders did not see a fourth man. f.r.42.

It is the evidence of Sanders, who only heard LaJoy's voice at the showup (other than the similar voice during the holdup), that was sought to be suppressed. It was the only identification evidence offered against LaJoy so far as presence at the bank holdup was concerned.

The events of the arrest search and seizure, and showup insofar as LaJoy is concerned are stated as follows in the Government Brief:

DATE OF DEFENDANTS' ARRESTS (EXCEPT PATRICK SCHANG) AND THE LINEUP

The facts subsequent to the return of the indictment, which was returned by a federal Grand Jury on September 26, 1963, are based upon testimony adduced at the hearing on the defendants' Motions to Suppress.

The defendant LaJoy testified that he was asleep in his home about 4:30 A.M. on September 27, 1963, when, after being awakened by a loud knock, he arose, answered the front door and was confronted by an F.B.I. agent pointing a revolver at him, accompanied by two other agents.

The armed agent displayed his credentials and informed LaJoy he was under arrest for the robbery of the Franklin Park Bank. At the time of such entry nothing was said by any agent concerning any kind of warrant. f.r.111. LaJoy testified further that he was kept in the recreation room of his home from about 4:30 A.M. until 8:30 A.M. during which time he was questioned by one agent while others searched his home. f.r.112. LaJoy also stated that during such period of time he was never advised that he had a right or an opportunity to call an attorney, nor was he told he was under any formal criminal charges, and that just before he was taken from his home than morning by the agents he requested permission to make a telephone call, and was told by one of them whose identity he couldn't recall that "it wasn't necessary", after which he then told his wife to call his brother. f.r.113. He was then taken to the Chicago office of the F.B.I., arriving there about 9:00 A.M., where he was fingerprinted, photographed, and taken to a large washroom, where after being given coffee, he remained about 15 or 20 minutes. f.r.114. He was then taken to a large room, half of which was dark and the other half brightly lighted, and was ordered, together with a group of other men, including the defendants D'Argento and Tomaszck, to step forward, turn sideways, turn around and further ordered to repeat certain phrases. Each person in the lineup was required to do the same. He did not know who else was in the room, but he did see a maze of heads, approximately 20 to 30 people, in the darkened portion of the room. f.r.115. After this lineup, which occurred about 10:00 A.M., he was turned over to the United States Marshal, arriving in the Marshal's office about 10:30 A.M. or 11:00 A.M. f.r.116. Upon cross-

examination, LaJoy stated he did not make any request to call an attorney while he was in the FBI offices, f.r.117.

About noon he talked to his attorney, Maurice Walsh, in the Marshal's lockup, and at 2:00 P.M. that day he was brought before Judge Parsons, f.r.118. LaJoy further testified he was not questioned or interrogated by anyone after he was turned over to the United States Marshal. f.r119.

Agent Hall of the F.B.I. testified that he and two other agents without drawn guns entered the LaJoy home after being admitted by LaJoy at approximately 5:05 A.M., and that he identified himself, showed LaJoy his credentials and then Agent Ragsdale advised LaJoy they had a warrant for his arrest which he requested them to show to him. f.r.120. Agent Ragsdale then advised LaJoy he was under arrest and that the agents did not have the warrant with them as they were not required to do so and that he did not have to say anything and anything he did say could be held against him in a court of law. LaJoy was further advised he had a right to an attorney. Other agents were then admitted to the premises and Agents Hall and Ragsdale sat down with LaJoy in the recreation room while the others searched the premises for the money taken in the robbery, weapons used in the crime or which might be used to effect an escape, as well as any instruments of the crime. f.r.121. Among the items found in such search was a .38 caliber snub-nosed revolver and a rifle. f.r.122. (Neither of which the Government introduced or attempted to introduce in the trial of this cause). During such search, the defendant's wife was permitted to move freely about the house and

prepared and served her husband coffee. The defendant was also allowed to dress and use the washroom. f.r.123. The defendant, LaJoy, was taken from his home about 7:45 or 8:00 A.M. and arrived at the F.B.I. office about 8:40 or 8:45 A.M., where he was photographed, fingerprinted, allowed to use the washroom and given something to eat. The lineup was then held and after it, he was then taken to the United States Marshal's office. f.r.124.

Hall also stated that LaJoy did not at any time while at his home that morning request permission to use the telephone nor did he make such a request or ask to consult an attorney while in the F.B.I. offices that morning. f.r.125.

The facts relating to the return of the indictment, the plan to simultaneously arrest the defendants and the conduct of the lineup follow. (Such facts are based upon testimony adduced at the hearing on the Defendants' Motions to Suppress as well as testimony heard in the trial of this case):

Agent Green testified during the hearing on the Defendants' Motions to Suppress that he was the agent in charge of the investigation of the Franklin Park Bank robbery. He further stated that some time between 3:00 and 5:00 P.M. on September 26, 1963 (the day before the arrests of the defendants in their homes), he was advised by Assistant United States Attorney Donald Joyce that warrants had been issued for the arrests of the defendants pursuant to an indictment returned that day. About 5:00 P.M. a conference was held at the FBI offices at which was planned a coordinated, simultaneous arrest of all the defendants in their homes about 5:00 A.M. the next day. Present were

some, but not all, of the agents who would carry out assignments the next day effecting such arrests. Although it was intended that such arrests take place in the defendants' homes, they were to be arrested wherever found, and there were no instructions or orders given not to arrest elsewhere than in the homes, and no orders were given to make certain such arrests took place in their homes. The agents further were instructed to make a search incidental to such arrests. f.r.164. At such meeting, it was also planned that a lineup would be held which would be attended by some witnesses, in which lineup the participants would repeat the phrases used by the bank robbers. f.r.165. Green also testified that when he entered the Tomaszck home to arrest him the next day, he did not know if Tomaszck was at home, although he assumed he would be at that hour. f.r.166.

With respect to the lineup conducted on the morning of September 27, 1963 (in which the defendants La Joy, Tomaszck and Schang took part), Agent Green testified as follows: The lineup commenced about 9:57 A.M., because that was the earliest that the FBI could gather the witnesses and transport them to the FBI offices in downtown Chicago. About eighteen possible witnesses observed the lineup. Prior to their viewing the persons in the lineup, the witnesses were told they were going to observe a group of individuals. They were not told the names of the persons they would view or their backgrounds, nor that anyone was under arrest or indicted for the robbery, but were merely told the individuals they viewed would be numbered and they (the observers) should sit apart from one another and that they should not communicate with one another as their individual recollection was required. They were further told that if they recognized any of the persons

or any charateristics of the persons in the lineup in any way, they should write down on a small piece of paper the number of such person. They were also told that they would later be interviewed individually by FBI agents concerning the number or numbers of the persons they had written down. They were also told that if they wanted one of the lineup participants to repeat a movement, they were to talk to an agent without letting the other witnesses overhear, so as not to influence other witnesses' judgments or statements. The lineup was held in an ordinary large room in the FBI office which was lighted with normal hanging ceiling fluorescent lighting fixtures, the rear lights of which were turned off and the front ones turned on, in order that the people in the lineup would not be able to clearly see the witnesses attending the lineup. Because of the limited space, two separate lineups involving two different groups of witnesses were carried out in order that the witnesses might be kept separated and not be able to communicate with one another nor observe what another might put down on his or her slip of paper. Three of the eight people in the lineup were defendants, the remaining ones were FBI agents and employees. The persons in the lineup were given instructions by number, such as "Number 1, step forward," left face," etc. as to what they should do, or say. No names were used addressing the participants in the lineup. Commands which were given to a participant in the lineup, such as a command to speak louder, were given not to any one individual in the lineup but were given to all participants in the lineup. Every man in the lineup was required to make statements in order beginning with the first man on the left. Each man also stepped forward in order and repeated various phrases. All persons in the lineup did this. Commands were issued by an agent using the same tone of

voice as to each person. Some of the FBI employees were attired similarly to the defendants. It was up to each person in the lineup as to what tone of voice he would use in repeating the phrases. No one in the lineup was told to use a different inflection, though he may have been told to speak in a louder tone. Several, including an agent, were asked to repeat phrases. Some of the witnesses appearing at the lineup had previously seen pictures of some or all of the defendants appearing in the lineup. Others had not seen any pictures at all. f.r.167. When asked about the defendant Tomaszck, Green stated he was not forced to utter the words he spoke in the lineup, and to his knowledge no attorney demanded to see Tomaszck during the period the lineup was being held. Had he done so, an attorney would have been permitted to see him. The purpose of the lineup was to see if witnesses who had previously seen photographs of individuals and had made statements regarding those individuals as to the pictures shown them, could recognize such individuals given an opportunity to see them in person and also to give other witnesses a chance to state their recollection based on a view of the whole person, as well as to see if some could identify a person based on certain characteristics, including height, build, posture or walk and voice. It was not intended to get people to make identifications who really could not do so. (Tomaszck's Exhibit No. 2 is a photograph of the lineup as it was viewed by the witnesses.) f.r.168. Agent Green did not advise Assistant United States Attorney Joyce what specific action would be taken regarding the arrests of the defendants, nor advise Joyce there was going to be a lineup. It is possible that Joyce knew that witnesses were coming into the FBI office the morning of the arrests, or that they

were already there and a showup would take place, but Green does not recall if such were the case. The lineups concluded at about 10:25 A.M. f.r.169.

Donald Joyce, former Assistant United States Attorney, testified that he presented this matter to a federal Grand Jury on September 26, 1963 and they returned an indictment that day. He requested suppression of such indictment, and appeared before Judge Campbell requesting the judge to order it suppressed, which he did. Joyce assumed that bench warrants would subsequently be issued. f.r.170. The purpose of the suppressed indictment was to protect the identity of witnesses, and effect apprehension of the defendants by means of a simultaneous arrest. Although he expected a lineup to be held, he does not recall being told specifically one would be held, and the lineup did not in any way enter into his decision to present this case to a Grand Jury and obtain a suppression order and bench warrants. He assumed or was told the defendants would be arrested early on the morning of the 27th and he expected the agents would conduct searches incident to such arrests. However, there was no discussion relating to the arrest of a defendant outside his or her home, nor was any order given not to arrest outside the home. After the lineup, he was advised it had been held, and he then presented a motion to the court to lift the suppression order. f.r.171.

In the course of the trial, the following testimony was adduced, generally on cross examination, relating to the witnesses' recollection of the conduct of the lineup and the circumstances of their presence at the lineup.

Sanders testified that he received notice from Mr. Beck of a lineup on the morning of the lineup. He then went to the FBI offices. Prior to the lineup he had not seen photographs of any person in connection with the robbery.

He did not know an indictment had been returned, nor did he know who was going to be in the lineup. He observed the lineup and pursuant to instructions to write the number of the man, if he saw any similarities or anything pertaining to the holdup, he wrote down a number on a slip of paper and gave it to an agent. f.r.174.

Mrs. Sampson testified that she was driven to the lineup by an agent who came to her home in Franklin Park about 8:15 A.M. Prior to that day she had been shown pictures, including those of LaJoy, Schang, and D'Argento, by FBI agents. Each man in the lineup had a number and she was given pieces of paper to write the numbers on. These slips were then collected by an agent. f.r.175.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit, in this case, for the following reasons.

1. Issues involved in this case are pending decision by this Court in three cases where certiorari has been granted, the cases briefed, and argument had. These cases are now awaiting decision after argument and are:

No. 334 *United States* v. *Wade*
Case below, C.A.5, 358 F.2d 557
Argued February 16, 1967

No. 223 *Gilbert* v. *California*
63 A.C. 722 California Sup. Ct.
Argued February 15 and 16, 1967

No. 254 *Stovall* v. *Denno*
C.A.2 355 F.2d 731
Argued February 16, 1967

2. In addition to the issues involved in those cases, the denial and nullification of the right to make allowed bail, by failure to inform the petitioner of it, and denial of opportunity to make it, denied the Eighth Amendment right to bail, in the case at bar.

3. The practices indulged in by the prosecutor and the Federal Bureau of Investigation involving manipulation of grand jury indictment process and a suppression order, so as to enable a search and seizure in a dwelling, where no probable cause for search existed and detention of a citizen without following the command of Rule 9(c) F.R. Cr.P. resulting in creation of voice identification evidence, without which it is unlikely that the petitioner could have been convicted, require examination by this Court and exercise of sanctions under the Court's supervisory powers over the administration of justice.

ARGUMENT.

The Court of Appeals for the Seventh Circuit, in its opinion in this case, indicated that it was not impressed with the obvious flagrant disregard of Rule 9(c) F.R.Cr.P. by the prosecutor and the F.B.I.

It further appeared unconcerned as to the nature and validity of the evidence secured by illegal detention arranged by the hurried and expedient use of the grand jury to return an indictment three days after a bank robbery and while the investigation was still pending, so that the purported process which would issue upon such indictment could be used to search a defendant's home as a purported incident of arrest, and to make practical and easy the continued detention of the defendant in the indictment by keeping him so busy with interrogation, identification operations and a line-up or show-up calculated to secure voice identification, beyond the time at which he should be presented in Court for arraignment under Rule 9(c) F.R.Cr.P., if that rule was to have any benefit or protection for the accused.

Rule 9(c) F.R.Cr.P. is indeed, a nullity, if a prosecutor and the F.B.I. can so reform it as to eliminate the word "promptly" and substitute in effect "when interrogation and investigation of the accused has been completed." There would then be no purpose for the rule and it might as well be eliminated. The prosecutor and the F.B.I. would at some time present the accused in Court to face the evidence it had secured by use of his detention, and this apparently was the interpretation placed upon the rule by the Government and by the Courts below. The facts in

this case apparently were well understood by the Court of Appeals. The Court succinctly described the scheme of the prosecutor and the agents to secure evidence, (although it uses the word "plans").

At pages 3 and 4 of its slip opinion, the Seventh Circuit Court of Appeals wrote in this case:

> "F.B.I. agent Green testified he was the agent in charge of the investigation of the Franklin Park bank robbery. Between 3 p.m. and 5 p.m. on September 23, 1963, he was officially informed that warrants had been issued for the arrest of each of the defendants pursuant to an indictment which had been returned earlier that day. Plans were made by the F.B.I. for a coordinated, simultaneous arrest of all of the defendants in their homes at 5 a.m. the next day. The agents were further instructed to make a search incidental to such arrests. *Plans also were made for a lineup in which the participants would be asked to repeat certain phrases and words that had been used by the robbers during the bank robbery.*" (Emphasis supplied.)

Thus, there is squarely before this Court a situation where an F.B.I. agent, who admittedly did not have sufficient evidence for a search warrant (see Green's testimony during motion to suppress evidence), connives with the United States Attorney to secure an indictment admittedly before investigation is complete, so that an unjustified search can be made of dwellings of defendants in the night, and a detention without counsel or opportunity to make bail can be utilized to manipulate the defendant into a long interrogation at his home and an exhibition of him to suggestible witnesses in a line-up.

"Each man in the lineup *was required* to make *statements* in regular order beginning with No. 1.

> Each man stepped forward as he repeated various phrases. All of the persons in the lineup did this. *The commands* of the F.B.I. agent were in the same tone as to each person." (Emphasis supplied.) (Page 5, slip opinion.)

The "fairness" of the lineup is emphasized by the Court of Appeals, but no mention is made of the identification of F.B.I. agents as participants in the robbery or subsequent events, by witnesses who attended the lineup and testified in Court. The notes written by these witnesses showing their claimed identifications were completely destroyed. Whether this was part of the "plans" could not be established.

The return of the indictment ended the investigatorial stage of the case as to LaJoy. The accusatorial stage was definitely established, especially since his liberty was made subject to $50,000 bail on mere request of the prosecutor, but totally without showing to justify this fantastically high bail for LaJoy, who testified that he had no prior record of conviction. Considering LaJoy's family, self-owned home in a respectable suburb, business operation of a grocery business, the use of such bail, which no one could make without opportunity to negotiate with sureties, or liquidate his holdings, makes obvious that this, too, was part of the design, or the "plan(s)" to search his home in the nighttime and "require" him to exhibit himself, before he could make bail or secure an attorney.

The obvious "plan" of the Department of Justice to frustrate and avoid its obligation to inform the defendant of the amount of his bail and take him before the District Court in accordance with Rule 9(c) F.R.C.P., was carried out and his Constitutional right to bail was thus destroyed until he was produced before the district court, which did not occur until after noon.

The Court below vacillates on its finding as to when the F.B.I. finished its coercive custody. At page 8 of its opinion, the defendants are described as being turned over to the Marshal at "about thirty minutes from the time that the federal courts in Chicago were open for business," but at page 9, the turn over time appears as 10:45 or 11:00 a.m. "The lineup was held from 9:57 to 10:25 a.m." (Page 9, slip opinion.)

No matter which of these is accurate, it is still clear that at the very time that the Department of Justice had the duty under law to permit bail and to produce the defendant LaJoy in the district court, it flouted Rule 9, the Constitutional rights of the defendant, and the decisions of the Supreme Court and *commenced* its compulsory exhibition of the defendant and its compulsion of his incriminatory statements.

The Court of Appeals has given no consideration to the alternatives left to this inexperienced defendant, without counsel, at the "showup".

What would refusal to participate by the defendant have brought on? Exposure by himself, perhaps, under physical force.

Would not refusal to say the "required" words on the "command" of the prestigious F.B.I. have subjected him to some physical or oral abuse or coercion? Or when the F.B.I. agents or cooperative defendants in the line-up spoke the "commanded" and "required" words, would his refusal to obey make his guilt and identification clear to inexperienced lay witnesses who were so suggestible that some of them identified F.B.I. agents as bank robbers. (Incidentally, as far as fairness goes, a request for the written identifications made by all witnesses was met by

the statement that these original items of evidence had been destroyed by the F.B.I., in the manner that original notes of interviews by F.B.I. agents of witnesses are destroyed so as to be not available for production under 3500 T. 18 U.S.C.)

An inexperienced layman should not be schemed into such a quandary, without counsel, after having his home invaded at 5 a.m. by pretext and the obvious fright to his wife and family.

Very little is said about any attempts by the F.B.I. to secure counsel for inexperienced but indicted LaJoy. This is because no attempt was made. The formalistic words "You are entitled to a lawyer" were little comfort and certainly were contradicted by the carefully plotted activities of the agents.

No information was given him about his right to bail and no opportunity to make it was afforded. The Department of Justice apparently assumed that its use of the suppressed indictment technique gave the F.B.I. proprietorship over LaJoy until it completed its "plans" to incriminate him despite the Rule 9, and the Constitutional provisions for bail, against self-incrimination and for due process.

The Department of Justice abused the practices and processes of the District Court. If this indictment was based on adequate evidence, why the "plans" to circumvent the ordinary process of law by an indictment suppressed even from the Marshal, to whom process was finally addressed and delivered?

The similarity in issues concerning custodial exhibition for the purpose of securing evidence of voice identification between this case and the cases argued and awaiting de-

cision in this Court at this term, No. 223, *Gilbert* v. *California,* argued February 15 and 16, 1967; No. 254, *Stovall* v. *Denno,* argued February 16, 1967; and No. 334, *United States* v. *Wade,* argued February 16, 1967, may well be persuasive in the grant or denial of certiorari in this case.

However, it is urged that in addition to those issues involving interpretation of prior decisions of this Court in *Escobedo* v. *Illinois,* 378 U.S. 478; *Massiah* v. *United States,* 377 U.S. 201; and *Mallory* v. *United States,* 354 U.S. 449; there is involved in this case the question of whether the "plan" of the prosecutor and the F.B.I. to use the indictment process for the purpose of conducting a search and seizure incidental to arrest and of obtaining custody and proprietorship over an accused in a suppressed indictment so that he could not make allowed bail or have the assistance of counsel until after completion of investigation and securing of voice identification, should be permitted. It is submitted that some reason for suppression should be incorporated in the record on application so that the indictment suppressed does not merely become a tool to be substituted for reasonable cause for search and seizure.

The petitioner urges upon the Court that its supervisory powers should be exercised to stop this misuse of the grand jury processes as a substitute for probable cause for search and seizure.

CONCLUSION.

Wherefore, this Petitioner prays this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

MAURICE J. WALSH,
Attorney for Petitioner.

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1966—JANUARY SESSION, 1967

No. 15287, 288, 289 AND 290

UNITED STATES OF AMERICA,
Appellee,
v.
JOSEPH D'ARGENTO, MIKE LAJOY, GERALD TOMASZCK AND PATRICK SCHANG,
Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 5, 1967

Before DUFFY, *Senior Circuit Judge*, KNOCH and CASTLE, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* After trial by jury, all defendants except Jean Schang were found guilty of violation of Title 18, U.S.C. §2113 (Bank Robbery Statute). Defendant Jean Schang was charged with aiding and abetting the other defendants, but the jury found her not guilty.

Three groups of attorneys have and do represent one or more of the various defendants. All of the attorneys urge that the evidence was insufficient to sustain the

guilty verdicts against their clients. All of them further contend that a lineup or showup conducted by agents of the Federal Bureau of Investigation resulted in violations of the Fifth Amendment prohibition against compulsory self-incrimination, and the Sixth Amendment right to counsel.[1] These issues make necessary a somewhat detailed description of the bank robbery and events occurring shortly thereafter; also a description of the manner in which the lineup was conducted.

Evidence received at the trial disclosed that on September 23, 1963, at approximately 11:30 a.m., four masked men entered the Franklin Park bank in Franklin Park, Illinois. The number 1 man stayed near the front door of the bank. He wore coveralls, a long dark coat and he had a head covering on his head over a mask. The bank president, Mr. Beck, testified this man weighed 150 to 160 pounds, was 5′ 6″ to 5′ 8″ in height, and was of solid build and stature.

The number 2 man leaped over a railing and entered cages 8 and 9, passing closely by the bank president. This man shouted directions such as "Stay where you are," "stand still," and "don't move." The number 2 man was well built, about 6′ tall and weighed about 200 pounds. As did the others, he wore a mask of T-shirt material with slits cut over the eyes; he also wore dark gloves, one-piece coveralls, carried a revolver and also a cardboard carton upon which the name "Ballantine" appeared.

---

[1] The defendant Patrick Schang was not arrested at the same time as the other defendants, and did not participate in the lineup. Therefore, no argument with respect to the lineup is made on his behalf.

This man took money from the cash drawers and placed it in the carton. The number 2 man then moved to other cages and gave directions such as "Get down on your knees" and "Cover your eyes."

The number 3 man was in the tellers' area behind the cages. He wore a coverall and a hood. The number 4 man was standing ten to twelve feet from where president Back was standing. He was described as 5' 10" or 11" in height, and weighing from 175 to 180 pounds. He wore a one-piece coverall, a light tan jacket and a tightly fitted mask. He also wore dark colored gloves and held a revolver. Witnesses noted that this man had an unusual posture, holding his head in a forward position with his chin jutting out.

The robbers obtained $43,000 in cash, and as the four men were running away from the bank, they got into a black 1963 two-door Chevrolet Impala driven by a fifth man. An employee of the Bank had alerted the local police and as the robbers drove away, they were followed in hot pursuit by two police cars. During the chase, one of the police officers observed two flashes from the back window of the Chevrolet, and noted that the window broke out. After following the get-away car for a short distance, the police lost sight of it.

Shortly thereafter, four men were observed getting out of a black Chevrolet automobile in an alley which ran in a northerly and southerly direction, and which separated Dora Street and Sarah Street. The automobile stopped opposite a garage at the rear of 3115 Dora Street. One man was observed jumping over the east fence of the alley and proceeding eastward; the other three men went in a westerly direction and entered the garage on the west side of the alley at 3115 Dora Street.

The black automobile continued westerly at a high speed. However, a short time thereafter, two police officers of the Franklin Park Police Department discovered a black 1963 Chevrolet automobile in the garage at the rear of 3115 Dora Street, the rear window of which was shattered. Two workman's caps, a used M-1 carbine shell and a white T-shirt with slits cut out were among the articles found in the automobile. A search of the house at 3115 Dora Street disclosed an M-1 carbine rifle, a pair of gloves and a "Ballantine" carton.

A brown coat containing a 25 caliber automatic pistol, a jacket and a pair of brown cotton gloves were found in a neighboring back yard. In front of the house at 3115 Dora Street, coveralls were found containing a 38 caliber snub-nosed revolver.

The residence at 3115 Dora Street was owned by Frank DeLegge, an uncle of the defendant LaJoy. A neighbor, Mrs. Sampson, upon hearing a screeching noise from outside, ran out of her house. She heard a door on the house at 3115 Dora Street close, and saw three men in the driveway. She identified one of them as LaJoy. She had seen him there previously on five different occasions. She also identified defendants Joseph D'Argento, and Patrick Schang as being in the driveway at that time.

FBI agent Green testified he was the agent in charge of the investigation of the Franklin Park bank robbery. Between 3 p.m. and 5 p.m. on September 23, 1963, he was officially informed that warrants had been issued for the arrest of each of the defendants pursuant to an indictment which had been returned earlier that day. Plans were made by the FBI for a coordinated, simultaneous arrest

of all of the defendants in their homes at 5 a.m. the next day. The agents were further instructed to make a search incidental to such arrests. Plans also were made for a lineup in which the participants would be asked to repeat certain phrases and words that had been used by the robbers during the bank robbery.

The lineup was held in an ordinary large room in the FBI office with normal hanging ceiling fluorescent light fixtures. The rear lights were turned off and the front lights turned on so that the people in the lineup would not be able to clearly see the witnesses attending the lineup. Two separate lineups involving two different groups of witnesses were carried on so that the witnesses might be kept separate and not able to communicate with one another or observe what another witness might have written on the piece of paper.

Defendants LaJoy, Tomaszck and D'Argento took part in the lineup on the morning of September 27, 1963. The lineup started functioning about 10 a.m. Eighteen possible witnesses observed the lineup. Prior to viewing the persons in the lineup, the witnesses were informed they were going to observe a group of individuals. They were not told the names of the persons they would view, or their backgrounds.

Each person in the lineup was numbered. Three of the eight people in the lineup were defendants in the instant case. The other five were FBI agents or employees. Some of the FBI employees were attired similarly to the defendants. The witnesses were kept separated and were not permitted to communicate with one another. The witnesses were told that if they recognized any of the persons or the characteristics of any of the persons

in the lineup, in any way, they should write down on a piece of paper the number of such person. They were also informed they would later be interviewed by the FBI agents concerning the number or numbers of the persons they had written down.

No names were used in addressing the participants in the lineup. They were addressed by their number only. Each man in the lineup was required to make statements in regular order beginning with No. 1. Each man stepped forward as he repeated various phrases. All of the persons in the lineup did this. The commands of the FBI agent were in the same tone of voice as to each person.

The holding of the lineup as hereinbefore described is the basis of the claim by defendants LaJoy, Tomaszck and D'Argento, that their rights to be protected against compulsory self-incrimination were violated. Defendant LaJoy states the issue as follows: Compelling the defendant Mike LaJoy, "after indictment, to exhibit himself and utter certain phrases in a lineup or showup . . . violates the Fifth Amendment's prohibition against compulsory self-incrimination, and any evidence derived therefrom is tainted and should be excluded."

The Government's position is that placement of a defendant in a lineup, whether or not he is required to speak words used by the perpetrator of the crime, is clearly not testimonial compulsion as prohibited by the Fifth Amendment to the Constitution. We agree with this view.

The courts have, quite generally, regarded a lineup as being a valid police procedure. In *United States* v. *Evans*, 3 Cir. (1966), 359 F.2d 776, a bank robbery case, it appeared a witness had identified the defendant in the lineup. The defendant was required to submit to the

viewing at a time when he was already incarcerated on a different charge. The Court held the defendant was not deprived of any constitutional right even though defendant was required to wear sun glasses as did the robber during the holdup. The opinion cited and followed the decision in *Rigney* v. *Hendrick*, 3 Cir. (1965), 355 F.2d 710, cert. den. 384 U.S. 975, where it was stated, p. 714—"We have found that the lineup procedure is both reasonable and consistent with the rules of fundamental fairness."

In *Schmerber* v. *California* (1966), 384 U.S. 757, the Supreme Court affirmed the right of the State of California at the direction of one of its police officers and over the objection of a defendant charged with driving an automobile while intoxicated, to withdraw at a hospital, a sample of his blood which was analyzed. The results of such analysis were introduced as evidence at his trial. This blood sample was withdrawn after Schmerber, acting upon advice of counsel, had refused to permit such withdrawal. The defendant strongly urged that such conduct violated his privilege against self-incrimination as secured to him against the states by the due process clause of the Fourteenth Amendment. The Supreme Court stated, at page 764: ". . . both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." (Footnote omitted.)

In his discussion of the privilege against self-incrimination Wigmore suggests the privilege is limited to testimonial disclosures. 8 Wigmore, Evidence, § 2263 (McNaughton rev. 1961). Wigmore further indicates the fol-

lowing situations, among others, are not within the scope of the protection under such privilege: requiring a person to write for identification; to appear in court; to assume a stance; to walk or make a particular gesture; to speak for identification even though such evidence can only be obtained with the cooperation of the defendant. *Id.* § 2265. These sections of Wigmore were cited by the Supreme Court in *Schmerber* v. *California, supra.*

In *Caldwell* v. *United States,* 8 Cir. (1964), 338 F.2d 385, cert. den. 380 U.S. 984, which was a bank robbery case, the defendant argued that being placed in a lineup violated his privilege against self-incrimination. The Court there was not faced with the additional issue of the defendant being required to repeat words or phrases. However, the language of the Court is significant. The Court said, page 389: "The mere viewing of a suspect under arrest by eye-witnesses does not violate this constitutional privilege because the prisoner is not required to be an unwilling witness against himself. There is a distinction between bodily view and requiring the accused to testify against himself."

The evidence hereinbefore quoted, demonstrates that the lineup at which defendants LaJoy, Tomaszck and D'Argento appeared, was fairly conducted and we hold that by reason thereof there was no violation of the Fifth Amendment's prohibition against compulsory self-incrimination.

The second principal contention of defendant LaJoy[2] is that compelling him, after indictment, to exhibit himself in the lineup in the absence of his attorney or his

---

[2] This defense is adopted by defendants Tomaszck and D'Argento.

express consent, violates his constitutional right to be represented by counsel as guaranteed by the Sixth Amendment. He relies upon *Massiah* v. *United States* (1964), 377 U.S. 201; *Escobedo* v. *Illinois* (1964), 378 U.S. 478, and *Wade* v. *United States*, 5 Cir. (1966), 358 F.2d 557.

There certainly was no disposition on the part of the FBI agents to prevent any of the defendants from contacting counsel. Prior to the lineup, defendant D'Argento was assisted by agent McLean in placing a telephone call to his attorney. Likewise, Mrs. Schang was assisted by an FBI agent in her attempt to call an attorney after she told him the attorney's name at her home that morning. Defendant Tomaszek, upon being informed of his rights, indicated it was too early to call an attorney and upon leaving his home, requested his wife to do so.

In *Williams* v. *United States*, DC Cir. (1965), 345 F.2d 733, cert. den. 382 U.S. 962, the defendant was convicted of robbery and assault with a dangerous weapon. He was identified by three witnesses in a police lineup held shortly after the commission of the crimes and at a time when he was without counsel. The Court stated that although the lack of assistance of counsel had been held fatal to conviction in a variety of circumstances including *Escobedo* v. *Illinois, supra,* and *Massiah* v. *United States, supra,* the *Williams* case did not resemble factually those cases. The Court said, page 734: "In the present case, especially in view of the fact that the evidence referred to consisted only of identification in a police lineup prior to indictment, the deprivation claimed cannot be held to have occurred."

Judge Burger wrote a concurring opinion in which he discussed the *Escobedo* holding, and concluded that a police lineup is not the type of interrogative activity forbidden by *Escobedo.*

In *Kennedy* v. *United States,* DC Cir. (1965), 353 F.2d 462, the defendant insisted his Sixth Amendment right to counsel was violated as he was without counsel when identified at the scene of the robbery. Judge Burger wrote the majority opinion and rejected an asolute mechanical application of the *Escobedo* rule which, in his judgment, is directed to police efforts to elicit a confession from a defendant without counsel being present.

Counsel for defendant LaJoy relies heavily on *Wade* v. *United States,* 5 Cir. (1966), 358 F.2d 557.[3] However, in *Wade,* there are significant differences from the case at bar. Wade had been indicted for conspiracy to rob a federally insured bank. Counsel had been appointed for him at least two weeks prior to the lineup. It was six months after the robbery that the lineup occurred. No notice of the lineup was given to Wade's attorney. Just before the lineup was conducted, Wade was observed by two lineup witnesses in the custody of an officer. The Court posed the issue thus, at page 559: "It becomes necessary, therefore, only to determine here whether requiring Wade to submit to a lineup of the character that has been depicted above in the absence of counsel already assigned to him, deprived him of the aid of counsel at a critical state of the prosecution. . . ."

In *Wade,* Chief Judge Tuttle who wrote the majority opinion, referred to *United States ex rel Stovall* v. *Denno,*

---

[3] The Supreme Court has granted certiorari in the *Wade* case and it is pending as No. 334, October Term 1966.

2 Cir. (1966), 355 F.2d 731, and stated at page 559: "We find no reason to express a contrary conclusion so far as relates to the ordinary police lineup which is carried out under conditions which permit the greatest objectivity of viewing the accused with others who are exhibited with him."

In the instant case, the FBI went to great lengths to insure the fairness of the lineup procedure. Each defendant was advised of his rights and given the opportunity to obtain counsel. The lineup was held promptly on the day of the arrest, and thereafter, about thirty minutes from the time that the federal courts in Chicago were open for business, the defendants were turned over to the United States Marshal prior to being brought before a judge for the purpose of arraignment.

In *Gilbert* v. *United States*, 9 Cir. (1966), 366 F.2d 923, the defendant argued that he had a right to counsel before being required to participate in the lineup. After referring to defendant's reliance on *Massiah*, *Escobedo* and other cases, the Court said, page 940: "We think it clear that the foregoing cases do not require a holding that Gilbert had a right to consult counsel before being placed in a lineup, or to the presence of counsel at a lineup." We agree.

Defendants LaJoy, Tomaszek and D'Argento all complain that they were deprived of due process because, they say, the arresting agents failed to promptly bring them before the Court, or for the purpose of admission to bail, before a Commissioner, in compliance with Rule 9 (c), F.R.Cr.P.[4]

---

[4] Rule 9 (c) provides that ". . . The officer executing the warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a Commissioner."

It should be noted that the indictment, by order of the District Court, was suppressed together with the warrants. Bail had been set for each defendant at $50,000. It was, therefore, unnecessary to bring the defendants before a court commissioner.

The delay of which defendants complain is the period from the time of the arrests at approximately 5 a.m. to about 10:45 or 11:00 a.m. when they were turned over to the United States Marshal to be brought into court.

After the arrests, a substantial period of time was spent in searching the premises incident to such arrest, preparing receipts for all items taken in the search, allowing the defendants to shave and dress, and transporting them from their homes to the FBI office. LaJoy and Tomaszck arrived there at about 8:45 a.m. D'Argento had arrived earlier and had been given coffee and a roll. All were fingerprinted and photographed. The lineup was held from 9:57 to 10:25 a.m.

During the period of which defendants complain, no confessions were made; no attempt was made to obtain confessions or statements from the defendants. We hold there was no unreasonable delay and that the defendants were not deprived of due process.

We reject the contention of each defendant that the evidence was insufficient to support the verdicts of the jury. We hold that the evidence, viewed in the light most favorable to the Government, supports the conclusion reached by the jury as to the guilt of all of the defendants.

Defendants LaJoy, Tomaszck and Schang produced alibi witnesses at the trial. It was the jury's duty and not ours to weigh the conflicting testimony.

Defendant LaJoy complains that the court erred in failing to give requested instruction "T."[5] He claims that in a colloquy (not found in the record on appeal), the Court indicated it would give such instruction, but that the Court did not inform counsel that such instruction would not be given until after the completion of the oral arguments.

Rule 30, F.R. Cr. P. does provide that the Court shall inform counsel of its proposed action upon request for instructions prior to the argument to the jury. However, we do not regard this failure in the instant case as reversible error in view of the Court's instruction which was given and which was based upon the Standard LaBuy instruction 6.04 relating to direct and circumstantial evidence. We think the jury was sufficiently and properly instructed.

The defendants have raised additional questions which we have carefully considered. We think these contentions are without merit and do not warrant further detailed discussion.

The judgment of conviction and sentence entered by the District Court with respect to each of the defendants is

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

---

[5] The requested instruction read as follows: "You may not draw any inference of guilt from any circumstance unless you have found that circumstance to be a fact proved beyond a reasonable doubt by the evidence."

APPENDIX B

Opinion by Judge Duffy

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago, Illinois 60604

Thursday, January 5, 1967

Before

Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

No. 15287, 15288, 15289 and 15290

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. JOSEPH D'ARGENTO, MIKE LAJOY, GERALD TOMASZCK AND PATRICK SCHANG, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of conviction and sentence entered by the said District Court with respect to each of the defendants be and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

Wednesday, March 8, 1967

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

No. 15287, 15288, 15289 and 15290

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOSEPH D'ARGENTO, MIKE LAJOY, GERALD TOMASZCK AND PATRICK SCHANG,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

All active Judges of this Court and Senior Judge Duffy have voted to deny the petitions for rehearing en banc filed herein.

Therefore, It Is Ordered by the Court en banc and Senior Judge Duffy that the petitions for rehearing en banc filed herein by the defendants-appellants, Joseph D'Argento, Mike LaJoy, Gerald Tomaszck and Patrick Schang, be, and the same are hereby Denied.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Chicago, Illinois 60604

Wednesday, March 8, 1967

Before
Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

No. 15287, 15288, 15289 and 15290

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOSEPH D'ARGENTO, MIKE LAJOY, GERALD TOMASZCK AND PATRICK SCHANG,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

It Is Ordered by the Court that the petitions for rehearing filed on behalf of the defendants-appellants, Joseph D'Argento, Mike LaJoy, Gerald Tomaszck and Patrick Schang, be, and the same are hereby Denied.

LIBRARY
SUPREME COURT, U. S.

MAY 1 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1967~~ 114

PATRICK SCHANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EUGENE T. DEVITT,
100 W. Monroe Street,
Chicago, Illinois,
Attorney for Petitioner.

THE GUTHRIE-HARDIN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement of the Case	2
Reasons for Granting the Writ	3

Appendix:

A. Opinion of the United States Court of Appeals for the Seventh Circuit ..... App. 7

B. Order denying Petition for Rehearing .... App. 19

CASE CITED.

Curley v. United States, 160 F. 2d 229	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. .....

PATRICK SCHANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Patrick Schang respectfully prays that a writ of certiorari issue to review the judgment of the Seventh Circuit entered in the above case on January 5, 1967.

OPINION BELOW.

The opinion of the Court below (Appendix A, page 7) is not yet reported. The District Court did not write or hand down any opinion.

JURISDICTION.

The judgment of the Court below was entered on January 5, 1967 (Appendix A, p. 7). Petition for rehearing by the petitioner was denied on March 8, 1967 (Appendix B, p. 20).

Counsel for petitioner represents to the Court that a Motion to extend time within which to file Petition for Writ of Certiorari, addressed to the Honorable Tom C. Clark, was deposited in the Elgin, Illinois post office at 8:35 A. M., April 8, 1967, with air mail, special delivery stamps affixed; that Elgin is approximately 20 miles from O'Hare Airport and air mail is sent by truck direct to the airport; that in the usual course of business this petition should have reached the Supreme Court building before midnight of the same day; that counsel has been informed by the Clerk of the Supreme Court that said petition was delivered at 7:25 P. M., on Sunday, April 9, 1967.

Petitioner prays this Court to waive its rules and consider this petition on its merits. The jurisdiction of the Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED.

Whether the denial of Patrick Schang's Motion for a severance and the denial of the Motion for a judgment of acquittal at the close of the Government's case as to co-defendant, Jean Schang, wife of petitioner (who was acquitted by the jury), prejudiced the constitutional rights of Patrick Schang.

STATEMENT OF THE CASE.

This is the Petition for Certiorari by Patrick Schang seeking review of the affirmance of a judgment on a verdict of guilty by a jury and a sentence of fifteen years imprisonment upon an indictment charging bank robbery and putting in jeopardy the lives of employees and customers by use of a dangerous weapon, to-wit, a firearm (Tr. 5).

Because of lack of funds to print the record, the Court of Appeals ordered that the parties could proceed on the official transcript and record of the District Court.

Petitioner states the evidence as it was described by the Government Brief in the Court of Appeals, pages 72-75. This evidence relates to Jean Schang and the version of the Government as to these events is adopted to avoid argument on the facts and because of the inability to print the testimony. The three co-defendants in this case have already filed with this Court the original transcript and record and this petitioner adopts this transcript and record.

REASONS FOR GRANTING THE WRIT.

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit, in this case for the following reasons:

1. Petitioner and his co-defendant and wife, Jean Schang, both made motions for severance and for separate trial in writing and said motions were denied. The denial of said motions deprived petitioner of due process and a fair trial. Severance should have been granted.

2. At the close of the Government's case and again at the close of all the evidence, motions for judgment of acquittal were made in behalf of the co-defendant and wife, Jean Schang. The motion at the close of the Government's case was denied but the Court took under advisement the motion at the close of all the evidence. It is the position of Patrick Schang that the motion should have been granted, as a matter of law, as to his wife thereby permitting him to call her as an untainted, unindicted witness.

ARGUMENT.

The Court of Appeals for the Seventh Circuit, in its opinion in this case, disposed of the contentions of petitioner in the following language:

"The defendants have raised additional questions which we have carefully considered. We think these contentions are without merit and do not warrant further detailed discussion."

At the close of the Government's case Jean Schang rested her case and offered no evidence contending that the evidence against her was so basically insufficient as to require the trial judge to grant a motion of acquittal upon her behalf. The Court's failure to grant her motion of acquittal deprived her husband, Patrick Schang, of the right to call her as a witness untainted by the facts of an indictment. The evidence against Jean Schang was practically non-existent. The weakness of this evidence was recognized by the jury by their acquittal of her.

Argument was made to the trial court relative to the prejudice that would inure to Patrick Schang by being deprived of the right to call his wife as a witness unencumbered by an indictment and that she should be judged acquitted or severed from the case. Credibility of a witness before a jury was the issue at stake.

When a motion for acquittal is made, it is the duty of the trial judge in passing upon it to determine if upon such evidence, giving full play to the right of the jury to determine credibility, weigh such evidence and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *Curley* v. *United States*, 160 F. 2d 229. If the trial judge concludes

that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion.

It is the position of the petitioner that as a matter of law a judgment of acquittal should have been granted as to his wife, Jean Schang. He was entitled to have the right to present Jean Schang, if he decided so to do, free of contamination of an indictment over her. He is deprived of due process of law if she is entitled to the granting of the motion. By reserving a ruling on the motion the stigma of the indictment was kept over her. The possible testimony of Jean Schang might have been accepted by the jury without the shadow and cloud of the indictment over her.

CONCLUSION.

Wherefore, this petitioner prays this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

EUGENE T. DEVITT,
Attorney for Petitioner.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

SEPTEMBER TERM, 1966 — JANUARY SESSION, 1967.

Nos. 15287, 288, 289 AND 290

UNITED STATES OF AMERICA,
Appellee,
v.
JOSEPH D'ARGENTO, MIKE LAJOY, GERALD TOMASZCK AND PATRICK SCHANG,
Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 5, 1967.

Before DUFFY, *Senior Circuit Judge,* KNOCH and CASTLE, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* After trial by jury, all defendants except Jean Schang were found guilty of violation of Title 18, U. S. C. § 2113 (Bank Robbery Statute). Defendant Jean Schang was charged with aiding and abetting the other defendants, but the jury found her not guilty.

Three groups of attorneys have and do represent one or more of the various defendants. All of the attorneys urge that the evidence was insufficient to sustain the guilty

verdicts against their clients. All of them further contend that a lineup or showup conducted by agents of the Federal Bureau of Investigation resulted in violations of the Fifth Amendment prohibition against compulsory self-incrimination, and the Sixth Amendment right to counsel.[1] These issues make necessary a somewhat detailed description of the bank robbery and events occurring shortly thereafter; also a description of the manner in which the lineup was conducted.

Evidence received at the trial disclosed that on September 23, 1963, at approximately 11:30 a.m., four masked men entered the Franklin Park bank in Franklin Park, Illinois. The number 1 man stayed near the front door of the bank. He wore coveralls, a long dark coat and he had a head covering on his head over a mask. The bank president, Mr. Beck, testified this man weighed 150 to 160 pounds, was 5′ 6″ to 5′ 8″ in height, and was of solid build and stature.

The number 2 man leaped over a railing and entered cages 8 and 9, passing closely by the bank president. This man shouted directions such as "Stay where you are," "stand still," and "don't move." The number 2 man was well built, about 6′ tall and weighed about 200 pounds. As did the others, he wore a mask of T-shirt material with slits cut over the eyes; he also wore dark gloves, one-piece coveralls, carried a revolver and also a cardboard carton upon which the name "Ballantine" appeared. This man took money from the cash drawers and placed it in the carton. The number 2 man then moved to other cages and gave directions such as "Get down on your knees" and "Cover your eyes."

The number 3 man was in the tellers' area behind the

1. The defendant Patrick Schang was not arrested at the same time as the other defendants, and did not participate in the lineup. Therefore, no argument with respect to the lineup is made on his behalf.

cages. He wore a coverall and a hood. The number 4 man was standing ten to twelve feet from where president Back was standing. He was described as 5'10" or 11" in height, and weighing from 175 to 180 pounds. He wore a one-piece coverall, a light tan jacket and a tightly fitted mask. He also wore dark colored gloves and held a revolver. Witnesses noted that this man had an unusual posture, holding his head in a forward position with his chin jutting out.

The robbers obtained $43,000 in cash, and as the four men were running away from the bank, they got into a black 1963 two-door Chevrolet Impala driven by a fifth man. An employee of the Bank had alerted the local police and as the robbers drove away, they were followed in hot pursuit by two police cars. During the chase, one of the police officers observed two flashes from the back window of the Chevrolet, and noted that the window broke out. After following the get-away car for a short distance, the police lost sight of it.

Shortly thereafter, four men were observed getting out of a black Chevrolet automobile in an alley which ran in a northerly and southerly direction, and which separated Dora Street and Sarah Street. The automobile stopped opposite a garage at the rear of 3115 Dora Street. One man was observed jumping over the east fence of the alley and proceeding eastward; the other three men went in a westerly direction and entered the garage on the west side of the alley at 3115 Dora Street.

The black automobile continued westerly at a high speed. However, a short time thereafter, two police officers of the Franklin Park Police Department discovered a black 1963 Chevrolet automobile in the garage at the rear of 3115 Dora Street, the rear window of which was shattered. Two workmen's caps, a used M-1 carbine shell and a white T-shirt with slits cut out were among the articles found in

the automobile. A search of the house at 3115 Dora Street disclosed an M-1 carbine rifle, a pair of gloves and a "Ballantine" carton.

A brown coat containing a 25 caliber automatic pistol, a jacket and a pair of brown cotton gloves were found in a neighboring back yard. In front of the house at 3115 Dora Street, coveralls were found containing a 38 caliber snub-nosed revolver.

The residence at 3115 Dora Street was owned by Frank DeLegge, an uncle of the defendant LaJoy. A neighbor, Mrs. Sampson, upon hearing a screeching noise from outside, ran out of her house. She heard a door on the house at 3115 Dora Street close, and saw three men in the driveway. She identified one of them as LaJoy. She had seen him there previously on five different occasions. She also identified defendants Joseph D'Argento, and Patrick Schang as being in the driveway at that time.

FBI agent Green testified he was the agent in charge of the investigation of the Franklin Park bank robbery. Between 3 p.m. and 5 p.m. on September 23, 1963, he was officially informed that warrants had been issued for the arrest of each of the defendants pursuant to an indictment which had been returned earlier that day. Plans were made by the FBI for a coordinated, simultaneous arrest of all of the defendants in their homes at 5 a.m. the next day. The agents were further instructed to make a search incidental to such arrests. Plans also were made for a lineup in which the participants would be asked to repeat certain phrases and words that had been used by the robbers during the bank robbery.

The lineup was held in an ordinary large room in the FBI office with normal hanging ceiling fluorescent light fixtures. The rear lights were turned off and the front lights turned on so that the people in the lineup would

not be able to clearly see the witnesses attending the lineup. Two separate lineups involving two different groups of witnesses were carried on so that the witnesses might be kept separate and not able to communicate with one another or observe what another witness might have written on the piece of paper.

Defendants LaJoy, Tomaszek and D'Argento took part in the lineup on the morning of September 27, 1963. The lineup started functioning about 10 a.m. Eighteen possible witnesses observed the lineup. Prior to viewing the persons in the lineup, the witnesses were informed they were going to observe a group of individuals. They were not told the names of the persons they would view or their backgrounds.

Each person in the lineup was numbered. Three of the eight people in the lineup were defendants in the instant case. The other five were FBI agents or employees. Some of the FBI employees were attired similarly to the defendants. The witnesses were kept separated and were not permitted to communicate with one another. The witnesses were told that if they recognized any of the persons or the characteristics of any of the persons in the lineup, in any way, they should write down on a piece of paper the number of such person. They were also informed they would later be interviewed by the FBI agents concerning the number or numbers of the persons they had written down.

No names were used in addressing the participants in the lineup. They were addressed by their number only. Each man in the lineup was required to make statements in regular order beginning with No. 1. Each man stepped forward as he repeated various phrases. All of the persons in the lineup did this. The commands of the FBI agent were in the same tone of voice as to each person.

The holding of the lineup as hereinbefore described

is the basis of the claim by defendants LaJoy, Tomaszck and D'Argento, that their rights to be protected against compulsory self-incrimination were violated. Defendant LaJoy states the issue as follows: Compelling the defendant Mike LaJoy, "after indictment, to exhibit himself and utter certain phrases in a lineup or showup . . . violates the Fifth Amendment's prohibition against compulsory self-incrimination, and any evidence derived therefrom is tainted and should be excluded."

The Government's position is that placement of a defendant in a lineup, whether or not he is required to speak words used by the perpetrator of the crime, is clearly not testimonial compulsion as prohibited by the Fifth Amendment to the Constitution. We agree with this view.

The courts have, quite generally, regarded a lineup as being a valid police procedure. In *United States* v. *Evans*, 3 Cir. (1966), 359 F. 2d 776, a bank robbery case, it appeared a witness had identified the defendant in the lineup. The defendant was required to submit to the viewing at a time when he was already incarcerated on a different charge. The Court held the defendant was not deprived of any constitutional right even though defendant was required to wear sun glasses as did the robber during the holdup. The opinion cited and followed the decision in *Rigney* v. *Hendrick*, 3 Cir. (1965), 355 F. 2d 710, cert. den. 384 U. S. 975, where it was stated, p. 714—"We have found that the lineup procedure is both reasonable and consistent with the rules of fundamental fairness."

In *Schmerber* v. *California* (1966), 384 U. S. 757, the Supreme Court affirmed the right of the State of California at the direction of one of its police officers and over the objection of a defendant charged with driving an automobile while intoxicated, to withdraw at a hospital, a sample of his blood which was analyzed. The results of such analysis were introduced as evidence at his trial. This

blood sample was withdrawn after Schmerber, acting upon advice of counsel, had refused to permit such withdrawal. The defendant strongly urged that such conduct violated his privilege against self-incrimination as secured to him against the states by the due process clause of the Fourteenth Amendment. The Supreme Court stated, at page 764: "... both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." (Footnote omitted.)

In his discussion of the privilege against self-incrimination Wigmore suggests the privilege is limited to testimonial disclosures. 8 Wigmore, Evidence, § 2263 (McNaughton rev. 1961). Wigmore further indicates the following situations, among others, are not within the scope of the protection under such privilege: requiring a person to write for identification; to appear in court; to assume a stance; to walk or make a particular gesture; to speak for identification even though such evidence can only be obtained with the cooperation of the defendant. *Id* § 2265. These sections of Wigmore were cited by the Supreme Court in *Schmerber* v. *California, supra.*

In *Caldwell* v. *United States,* 8 Cir. (1964), 338 F. 2d 385, cert. den. 380 U. S. 984, which was a bank robbery case, the defendant argued that being placed in a lineup violated his privilege against self-incrimination. The Court there was not faced with the additional issue of the defendant being required to repeat words or phrases. However, the language of the Court is significant. The Court said, page 389: "The mere viewing of a suspect under arrest by eyewitnesses does not violate this constitutional privilege, because the prisoner is not required to be an unwilling witness

against himself. There is a distinction between bodily view and requiring the accused to testify against himself."

The evidence hereinbefore quoted, demonstrates that the lineup at which defendants LaJoy, Tomaszck and D'Argento appeared, was fairly conducted and we hold that by reason thereof there was no violation of the Fifth Amendment's prohibition against compulsory self-incrimination.

The second principal contention of defendant LaJoy[2] is that compelling him, after indictment, to exhibit himself in the lineup in the absence of his attorney or his express consent, violates his constitutional right to be represented by counsel as guaranteed by the Sixth Amendment. He relies upon *Massiah* v. *United States* (1964), 377 U. S. 201; *Escobedo* v. *Illinois* (1964), 378 U. S. 478, and *Wade* v. *United States*, 5 Cir. (1966), 358 F. 2d 557.

There certainly was no disposition on the part of the FBI agents to prevent any of the defendants from contacting counsel. Prior to the lineup, defendant D'Argento was assisted by agent McLean in placing a telephone call to his attorney. Likewise, Mrs. Schang was assisted by an FBI agent in her attempt to call an attorney after she told him the attorney's name at her home that morning. Defendant Tomaszck, upon being informed of his rights, indicated it was too early to call an attorney and upon leaving his home, requested his wife to do so.

In *Williams* v. *United States*, DC Cir. (1965), 345 F. 2d 733, cert. den. 382 U. S. 962, the defendant was convicted of robbery and assault with a dangerous weapon. He was identified by three witnesses in a police lineup held shortly after the commission of the crimes and at a time when he was without counsel. The Court stated that although the lack of assistance of counsel had been held fatal to conviction in a variety of circumstances including *Escobedo* v.

[2] This defense is adopted by defendants Tomaszck and D'Argento.

Illinois, supra, and *Massiah* v. *United States, supra,* the *Williams* case did not resemble factually those cases. The Court said, page 734: "In the present case, especially in view of the fact that the evidence referred to consisted only of identification in a police lineup prior to indictment, the deprivation claimed cannot be held to have occurred."

Judge Burger wrote a concurring opinion in which he discussed the *Escobedo* holding, and concluded that a police lineup is not the type of interrogative activity forbidden by *Escobedo.*

In *Kennedy* v. *United States,* DC Cir. (1965), 353 F. 2d 462, the defendant insisted his Sixth Amendment right to counsel was violated as he was without counsel when identified at the scene of the robbery. Judge Burger wrote the majority opinion and rejected an absolute mechanical application of the *Escobedo* rule which, in his judgment, is directed to police efforts to elicit a confession from a defendant without counsel being present.

Counsel for defendant LaJoy relies heavily on *Wade* v. *United States,* 5 Cir. (1966), 358 F. 2d 557.[3] However, in *Wade,* there are significant differences from the case at bar. Wade had been indicted for conspiracy to rob a federally insured bank. Counsel had been appointed for him at least two weeks prior to the lineup. It was six months after the robbery that the lineup occurred. No notice of the lineup was given to Wade's attorney. Just before the lineup was conducted, Wade was observed by two lineup witnesses in the custody of an officer. The Court posed the issue thus, at page 559: "It becomes necessary, therefore, only to determine here whether requiring Wade to submit to a lineup of the character that has been depicted above in the absence of counsel already assigned to him, deprived him of the aid of counsel at a critical state of the prosecution. . . ."

[3] The Supreme Court has granted certiorari in the *Wade* case and it is pending as No. 334, October Term 1966.

In *Wade,* Chief Judge Tuttle who wrote the majority opinion, referred to *United States ex rel Stovall* v. *Denno,* 2 Cir. (1966), 355 F. 2d 731, and stated at page 559: "We find no reason to express a contrary conclusion so far as relates to the ordinary police lineup which is carried out under conditions which permit the greatest objectivity of viewing the accused with others who are exhibited with him."

In the instant case, the FBI went to great lengths to insure the fairness of the lineup procedure. Each defendant was advised of his rights and given the opportunity to obtain counsel. The lineup was held promptly on the day of the arrest, and thereafter, about thirty minutes from the time that the federal courts in Chicago were open for business, the defendants were turned over to the United States Marshal prior to being brought before a judge for the purpose of arraignment.

In *Gilbert* v. *United States,* 9 Cir. (1966), 366 F. 2d 923, the defendant argued that he had a right to counsel before being required to participate in the lineup. After referring to defendant's reliance on *Massiah, Escobedo* and other cases, the Court said, page 940: "We think it clear that the foregoing cases do not require a holding that Gilbert had a right to consult counsel before being placed in a lineup, or to the presence of counsel at a lineup." We agree.

Defendants LaJoy, Tomaszek and D'Argento all complain that they were deprived of due process because, they say, the arresting agents failed to promptly bring them before the Court, or for the purpose of admission to bail, before a Commissioner, in compliance with Rule 9 (c), F. R. Cr. P.[4]

---

[4] Rule 9 (c) provides that ". . . The officer executing the warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a Commissioner."

It should be noted that the indictment, by order of the District Court, was suppressed together with the warrants. Bail had been set for each defendant at $50,000. It was, therefore, unnecessary to bring the defendants before a court commissioner.

The delay of which defendants complain is the period from the time of the arrests at approximately 5 a. m. to about 10:45 or 11:00 a. m. when they were turned over to the United States Marshal to be brought into court.

After the arrests, a substantial period of time was spent in searching the premises incident to such arrest, preparing receipts for all items taken in the search, allowing the defendants to shave and dress, and transporting them from their homes to the FBI office. LaJoy and Tomaszck arrived there at about 8:45 a. m. D'Argento had arrived earlier and had been given coffee and a roll. All were fingerprinted and photographed. The lineup was held from 9:57 to 10:25 a. m.

During the period of which defendants complain, no confessions were made; no attempt was made to obtain confessions or statements from the defendants. We hold there was no unreasonable delay and that the defendants were not deprived of due process.

We reject the contention of each defendant that the evidence was insufficient to support the verdicts of the jury. We hold that the evidence, viewed in the light most favorable to the Government, supports the conclusion reached by the jury as to the guilt of all of the defendants.

Defendants LaJoy, Tomaszck and Schang produced alibi witnesses at the trial. It was the jury's duty and not ours to weigh the conflicting testimony.

Defendant LaJoy complains that the court erred in failing to give requested instruction "T."[5] He claims that in a colloquy (not found in the record on appeal), the Court indicated it would give such instruction, but that the Court did not inform counsel that such instruction would not be given until after the completion of the oral arguments.

Rule 30, F. R. Cr. P. does provide that the Court shall inform counsel of its proposed action upon request for instructions prior to the argument to the jury. However, we do not regard this failure in the instant case as reversible error in view of the Court's instruction which was given and which was based upon the Standard LaBuy instruction 6.04 relating to direct and circumstantial evidence. We think the jury was sufficiently and properly instructed.

The defendants have raised additional questions which we have carefully considered. We think these contentions are without merit and do not warrant further detailed discussion.

The judgment of conviction and sentence entered by the District Court with respect to each of the defendants is

AFFIRMED.

---

5. The requested instruction read as follows: "You may not draw any inference of guilt from any circumstance unless you have found that circumstance to be a fact proved beyond a reasonable doubt by the evidence."

APPENDIX B.

Opinion by Judge Duffy

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago, Illinois 60604

Thursday, January 5, 1967

Before

Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

No. 15287, 15288, 15289 and 15290

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOSEPH D'ARGENTO, MIKE LAJOY, GERALD TOMASZCK AND PATRICK SCHANG,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of conviction and sentence entered by the said District Court with respect to each of the defendants be and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago, Illinois 60604

Wednesday, March 8, 1967

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

No. 15287, 15288, 15289 and 15290

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOSEPH D'ARGENTO, MIKE LAJOY, GERALD TOMASZCK AND PATRICK SCHANG,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

All active Judges of this Court and Senior Judge Duffy have voted to deny the petitions for rehearing en banc filed herein.

Therefore, It Is Orderd by the Court en banc and Senior Judge Duffy that the petitions for rehearing en banc filed herein by the defendants-appellants, Joseph D'Argento, Mike LaJoy, Gerald Tomaszck and Patrick Schang, be, and the same are hereby Denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago, Illinois 60604

Wednesday, March 8, 1967

Before

Hon. F. RYAN DUFFY, *Senior Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*

No. 15287, 15288, 15289 and 15290

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* JOSEPH D'ARGENTO, MIKE LAJOY, GERALD TOMASZCK AND PATRICK SCHANG, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

It Is Ordered by the Court that the petitions for rehearing filed on behalf of the defendants-appellants, Joseph D'Argento, Mike LaJoy, Gerald Tomaszck and Patrick Schang, be, and the same are hereby Denied.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	3
Argument	8
Conclusion	14

CITATIONS

Cases:

Caldwell v. *United States*, 338 F. 2d 385, certiorari denied, 380 U.S. 984 — 10

Copeland v. *United States*, 343 F. 2d 287 — 10

Curley v. *United States*, 160 F. 2d 229, certiorari denied, 331 U.S. 837 — 13

Lawn v. *United States*, 355 U.S. 339 — 14

Mallory v. *United States*, 354 U.S. 449 — 9

Ralph v. *Pepersack*, 335 F. 2d 128, certiorari denied, 380 U.S. 925 — 10

Stovall v. *Delano*, No. 254, O.T., 1966, decided June 12, 1967 — 9

Trilling v. *United States*, 260 F. 2d 677 — 10

United States v. *Wade*, No. 334, O.T., 1966, decided June 12, 1967 — 8, 9

Statute and rules:

18 U.S.C. 2113 (a) and (d) — 3

Federal Rules of Criminal Procedure:

Rule 5(a) — 9, 10

Rule 29(b) — 13

289-278—67——1

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 81

GERALD TOMASZCK AND JOSEPH D'ARGENTO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 84

MIKE LAJOY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 114

PATRICK SCHANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 81 App.; Pet. No. 84 App. A; Pet. No. 114 App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1967. Petitions for rehearsing *en banc* were denied on March 8, 1967. The petition for a writ of certiorari in No. 81 was filed on April 6, 1967, and the petition for a writ of certiorari in No. 84 was filed on April 7, 1967. The petition for a writ of certiorari in No. 114 was not filed until May 1, 1967, and is therefore out of time under the Rules of this Court.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that a lineup (at which petitioners Tomaszek, D'Argento, and LaJoy and the five other participants were asked to utter specified phrases) was conducted shortly after petitioners' arrests upon an indictment but before their presentment to a court required exclusion of the courtroom identification of petitioners by the witnesses who had identified them at the lineup. (Pets. Nos. 81, 84).

2. Whether the evidence supported the conviction of petitioner Tomaszek (Pet. No. 81).

3. Whether the trial court, by failing to grant the motion by petitioner Schang's wife for a judgment of acquittal, committed error requiring the reversal of petitioner Schang's conviction (Pet. No. 114).

---

[1] A motion for an extension of time in which to file the petition was not deposited at the post office until April 8, 1967 (Pet. No. 114, p. 2), a day after the petition was due to be filed.

STATEMENT

Petitioners were convicted by a jury in the United States District Court for the Northern District of Illinois under an indictment charging that on September 23, 1963, they robbed a federally insured bank at gunpoint in violation of 18 U.S.C. 2113 (a) and (d).[2] On May 10, 1965, petitioners were each sentenced to imprisonment for a period of fifteen years. The court of appeals affirmed the convictions.

1. On September 23, 1963, at about 11:30 a.m., four men entered the Franklin Park Bank in Franklin Park, Illinois. Each wore one-piece coveralls and a hood made of T-shirt material with openings for the eyes (Tr. 155–157, 604–608, 797–798, 1460–1464).[3] The men ordered the persons present to remain where they were (Tr. 157). The first man stationed himself near the entrance; the second, carrying a revolver and a cardboard carton, vaulted into a teller's cage and began emptying the contents of the tills; the third, who was carrying an automatic pistol, began taking the cash from the other teller's cages; and the fourth man stood in the lobby with a revolver in his hand (Tr. 156–161, 168, 173, 278–279, 286–289, 604–615, 799–810, 860–861, 895, 1185–1197). The fourth man wore dark-rimmed glasses and had an unusual posture, holding his head in a forward position close to his shoulders with his chin jutting out (Tr. 166, 301–302).

---

[2] Petitioner Schang's wife was charged with aiding and abetting petitioners, but was found not guilty by the jury.

[3] "Tr." refers to the transcript of the trial proceedings. "H. Tr." refers to the transcript of the hearing on the motions to suppress.

About one minute after they had entered, the fourth man called "Time's up", and "Let's go" (Tr. 174, 290–291, 615, 810, 1195–1196). The men thereupon ran out of the bank, with more than $43,000 in cash stuffed in the cardboard carton (Tr. 1203). They entered a waiting 1963 Chevrolet automobile driven by an unmasked fifth man (Tr. 1463–1466).

As the automobile began speeding away, two police cars, which had been alerted by a remote alarm actuated by a bank employee (Tr. 797–798, 1804, 2227), arrived at the scene and followed the departing automobile (Tr. 1467, 1804, 1807–1808, 2230–2231). The chase reached speeds of ninety to one hundred miles an hour (Tr. 1814–1819). At one point, one of the officers saw two flashes in the rear window of the 1963 Chevrolet, and at the same time saw the window shatter (Tr. 2232). One of the police cars skidded into a spin but the other continued the pursuit (Tr. 1812–1823, 2232–2235). Shortly afterwards, the 1963 Chevrolet turned west on Minneapolis Street and then made a turn north into an alley between Dora Street on the west and Sarah Street on the east, losing the second police car in the process (Tr. 1822, 2022–2023, 2028–2030, 2823–2828). The vehicle stopped a short distance up the alley (Tr. 2033–2034). Several men, still wearing coveralls and white masks, got out of the car; one ran to the east toward Sarah Street, the others ran to the west toward Dora Street (Tr. 2035–2045). The car turned west into the garage at 3115 Dora Street (Tr. 2039–2040, 2135–2138)—an unoccupied residence owned by the uncle of petitioner LaJoy (Tr. 4895–4899, 4903–4906).

A few minutes later, petitioner Tomaszck, dishevelled and perspiring, was observed walking rapidly southward on Sarah Street toward Minneapolis Street from a point opposite the part of the alley where the car had stopped (Tr. 2822–2835, 2856, 2860, 2887–2893). (A pair of coveralls with a loaded .38 caliber revolver in one pocket was later found under a bush between the same point in the alley and Sarah Street (Tr. 2262–2269).) At about the same time, petitioners D'Argento and Schang were observed walking westward from the driveway at 3115 Dora Street (Tr. 2539, 2545–2555, 2967, 2970–2978, 3216–3223, 3260, 3264). Petitioner LaJoy then came out of the house at 3115 Dora Street and walked north (Tr. 2539, 2547–2549, 2556–2557). (Another pair of coveralls, two masks made from white T-shirts, an empty cardboard carton and a loaded M–1 rifle, were later found in the house (Tr. 2139–2147); additional clothing and a loaded automatic pistol were found in an adjoining yard (Tr. 2256–2262); another T-shirt mask and an expended M–1 cartridge shell were found on the floor of the automobile behind the shattered rear window (Tr. 3857, 3860, 3864–3870).) Shortly afterwards, petitioners D'Argento and Schang were observed arriving at Angela's Restaurant, located a few blocks due west of 3115 Dora Street (Tr. 3321–3324, 3327–3331, 3353–3355, 3489–3493, 3501, 3559–3560, 3568–3569, 6215–6235).

2. A sealed indictment was returned against petitioners on September 26, 1963; warrants of arrest were issued; and bail was fixed at $50,000 (H. Tr. 1428–1432).

The following morning, at about 5 or 5:15 a.m., petitioners Tomaszek, D'Argento, and LaJoy were arrested at their respective residences by agents of the F.B.I. (H. Tr. 119–122, 647, 651, 1237–1240, 1912–1916). Each petitioner was informed that he did not have to say anything, that anything he did say could be used against him in court, and that he had a right to consult an attorney (H. Tr. 120–122, 1245, 1283, 1913, 1916–1917). Petitioners D'Argento and LaJoy did not ask to talk to an attorney (H. Tr. 148, 1920–1921); petitioner Tomaszek stated to the agents that it was too early to telephone his attorney (H. Tr. 1246). The agents searched petitioners' residences, prepared receipts for all items seized; and gave petitioners the opportunity to shave and dress (H. Tr. 124, 126, 132, 378–379, 1241, 1251, 1254, 1917, 1922). Petitioner D'Argento was taken to the F.B.I. offices about 6:30 a.m. (H. Tr. 1923). He there telephoned his attorney and consulted with him (H. Tr. 1924, 1951–1952). Petitioners Tomaszek and LaJoy were taken to the F.B.I. offices at about 8:45 a.m. (H. Tr. 146, 1257). All three petitioners were fingerprinted, photographed and given something to eat (H. Tr. 146, 1332, 1926, 1926). About 9:30 a.m., an attorney for petitioner Tomaszek, whom Tomaszek had told his wife to call (H. Tr. 1254–1255), telephoned the F.B.I. office, asked what Tomaszek's status was, and asked whether he could see him. An agent answered the attorney's questions and assured him that he could see Tomaszek (H. Tr. 1257–1260, 1394–1395).

Shortly before 10 a.m. petitioners were taken to a room for a lineup. The evidence as to the manner of

conducting the lineup is summarized in the opinion of the court of appeals as follows (Pet. No. 81, App. pp. 4a-5a):

> The lineup was held in an ordinary large room in the FBI office with normal hanging ceiling fluorescent light fixtures. The rear lights were turned off and the front lights turned so that the people in the lineup would not be able to clearly see the witnesses attending the lineup. Two separate lineups involving two different groups of witnesses were carried on so that the witnesses might be kept separate and not able to communicate with one another or observe what another witness might have written on the piece of paper.
>
> Defendants LaJoy, Tomaszck and D'Argento took part in the lineup on the morning of September 27, 1963. The lineup started functioning about 10 a.m. Eighteen possible witnesses observed the lineup. Prior to viewing the persons in the lineup, the witnesses were informed they were going to observe a group of individuals. They were not told the names of the persons they would view, or their backgrounds.
>
> Each person in the lineup was numbered. Three of the eight people in the lineup were defendants in the instant case. The other five were FBI agents or employees. Some of the FBI employees were attired similarly to the defendants. The witnesses were kept separated and were not permitted to communicate with one another. The witnesses were told that if they recognized any of the persons or the characteristics of any of the persons in the lineup, in any way, they should write down on a piece of paper the number of such person. They were

also informed they would later be interviewed by the FBI agents concerning the number or numbers of the persons they had written down.

No names were used in addressing the participants in the lineup. They were addressed by their number only. Each man in the lineup was required to make statements in regular order beginning with No. 1. Each man stepped forward as he repeated various phrases. All of the persons in the lineup did this. The commands of the FBI agent were in the same tone of voice as to each person.

At the conclusion of the lineup, petitioners were taken to the office of the United States Marshal, arriving there between 10:30 and 11 a.m. (H.Tr. 44–45, 147, 1841–1842). The district court was not immediately available to hear bail matters (H. Tr. 198), but at some time between noon and 2 p.m., petitioners Tomaszck and LaJoy appeared with their attorneys before the district court and both petitioners posted the requisite bond (H. Tr. 46, 198–199, 1190, 1203–1204).

Various witnesses at the trial who identified petitioners had identified them at the lineup.[4]

ARGUMENT

1. This Court's recent decision in *United States* v. *Wade*, No. 334, October Term, 1966, June 12, 1967,

[4] The president of the bank identified Tomaszck as resembling the man who stood in the lobby holding a revolver (Tr. 185–190, 374–376, 388–389, 583–585). Two housewives, both of whom lived near the corner of Minneapolis and Sarah Streets, identified him as the man they had observed walking away from the terminus of the getaway car (Tr. 2834, 2844–2845, 2871, 2896, 2948–2949, 2959).

establishes that the placing of petitioners Tomaszck, D'Argento, and LaJoy in a lineup at which they were asked to speak for voice identification did not violate their privilege against compelled self-incrimination; and the requirement announced in *Wade* that a lineup participant be afforded a right to the presence of counsel during the identification procedure is applicable only to lineups conducted after the date of that decision. *Stovall* v. *Denno*, decided June 12, 1967, No. 254, October Term, 1966. Since the lineup here was conducted fairly (see Statement, *supra*, pp. 7–8), no independent due process question exists or was raised.

The three petitioners contend, however, that since the lineup took place between the time of their arrest and the time of their appearance before the district court, the government agents violated Rule 9(c), F.R. Crim. P., which requires an arrested person to be brought "promptly before the court," and that the testimony of the identifying witness should be rendered inadmissible as a sanction similar to that imposed by *Mallory* v. *United States*, 354 U.S. 449, with respect to statements obtained as a result of an "unnecessary delay" in violation of Rule 5(a), F.R. Crim. P. The *Mallory* rule, however, serves as a prophylactic against possible official overreaching to secure from a suspect that which he has a right to withhold. An accused has no right not to appear in a lineup any more than he has a right not to be fingerprinted. A brief delay for this legitimate police technique is not unreasonable and has been held not to constitute an

unnecessary delay under Rule 5(a). *Caldwell* v. *United States*, 338 F. 2d 385, 388–389 (C.A. 8), certiorari denied, 380 U.S. 984; see *Copeland* v. *United States*, 343 F. 2d 287, 290 (C.A.D.C.); *Ralph* v. *Pepersack*, 335 F. 2d 128, 139 (C.A. 4), certiorari denied 380 U.S. 925; *Trilling* v. *United States*, 260 F. 2d 677, 683 (C.A.D.C.).

Here, the delay attributable to the lineup amounted to approximately thirty minutes, the remaining time between arrest and presentment having been consumed by the incidental searches of petitioners' residences, the cross-town drive to the F.B.I. offices, the general processing and photographing and fingerprinting, and the post-lineup wait in the cell at the United States Marshal's office until the district court had time to hear the matter. From the record, in fact, it appears that the district court would not have reached the case sooner if petitioners had been made available at 10 a.m., when the court first opened, rather than between 10:30 or 11 a.m., when they were taken to wait in the Marshal's office (see H. Tr. 198). Accordingly, as the district court found at the conclusion of the hearing on the motions to suppress (H. Tr. 2624, 2628–2629, 2633; see 2613–2614), there was no unreasonable delay here.

2. The evidence was plainly sufficient to sustain the conviction of petitioner Tomaszek. Although the robbers had been masked, an eyewitness to the offense identified petitioner Tomaszek—by his glasses, his size, and, more particularly, by his unusual manner of holding his head thrust forward, close to his shoulders, with his chin jutting out—as resembling the

fourth robber who had stood in the lobby holding a revolver (Tr. 166, 185–187, 189–190, 301–302, 583–585). When the getaway car stopped in the alley, a man wearing coveralls and a T-shirt mask left the vehicle and ran eastward toward Sarah Street (Tr. 2035–2045). A few minutes later, petitioner Tomaszek was seen walking rapidly on Sarah Street from a point toward which the robber had been running (Tr. 2829–2835, 2856, 2860, 2887–2893, 2898). He was perspiring, his hair was rumpled, and while walking he put on a pair of glasses (Tr. 2833–2834, 2890). He appeared to be carrying a white fabric in his hands (Tr. 2833). Between the point where the robber was last seen and the point where petitioner Tomaszek was first seen, a pair of coveralls and a revolver were found under a bush[5] (Tr. 2262–2269). Additionally, on several occasions prior to the robbery petitioner Tomaszek had been observed in the company of petitioner Schang (Tr. 4839–4841), the unmasked driver of the getaway car (Tr. 1467). The jury's finding was thus amply supported.

3. Petitioner Schang argues that the trial court erred in failing to grant Mrs. Schang's motion for a judgment of acquittal at the time she rested her case, and that, in consequence, he was improperly deprived

---

[5] Petitioner Tomaszek points out that a raincoat, which was worn over the coveralls of one of the first three robbers rather than the fourth, was also found east of the alley (Pet. No. 81, p. 9); presumably indicating that someone other than he was the man who had run eastward. The raincoat, however, was discovered just past the east edge of the alley, and at a point adjacent to the spot where the car had first stopped—a point where it could have been tossed by any of the occupants of the vehicle (see Tr. 2256–2262).

of an opportunity to call her as a witness who could testify without her credibility being tainted by her being under indictment.

The evidence showed that about 11:50 a.m. on the day of the robbery, Mrs. Schang left her house telling her maid she was going to buy sandwiches. She walked toward an automobile she had borrowed but turned suddenly when two men in a vehicle with a police-type light and a long radio antenna pulled into the parking space behind the borrowed car (Tr. 3760–3764, 3777, 3779, 3788–3791). After one of the men left the car carrying a sewer rod and walked toward a nearby intersection (Tr. 3792), Mrs. Schang reappeared, entered the borrowed automobile and drove at a speed of almost seventy miles an hour to the parking lot at Angela's Restaurant (Tr. 3792–3795). Petitioner D'Argento and Schang came out of the restaurant, entered the car, and were driven away by Mrs. Schang (Tr. 3339–3351). Mrs. Schang later returned to her residence alone (Tr. 3763–3764).

Mrs. Schang's motion for acquittal at the close of the government's case was denied (Tr. 5297–5298) after extended argum nt (Tr. 5064–5151). Mrs. Schang then rested her case without presenting any evidence in her defense (Tr. 5305), and renewed her motion for a judgment of acquittal. The trial court stated that it would reserve decision in order to avoid any possible prejudice a judgment of acquittal might cause the other defendants who had not yet rested their cases (Tr. 5644–5645, 6326–6327). Counsel for petitioner Schang then noted that Mrs. Schang would be a more valuable potential witness for petitioner

if she could testify "free of the contamination of an indictment over her", and that he would like a ruling on Schang's motion before he rested since he "may want to use Jean Schang as a witness cleared of this charge" (Tr. 5312–5315). Counsel later requested that Mrs. Schang be granted a judgment of acquittal, noting "I do not intend, unless Jean Schang is acquitted, to place her on the witness stand. If she be acquitted I will then make that determination in the light of the remainder of the defendants' testimony" (Tr. 5642). The court continued to reserve its ruling (Tr. 5645).

There was no error by the district court. Rule 29(b), F.R. Crim. P., specifically permits a court to reserve decision on a motion for acquittal until the case has been submitted to a jury. In any event, denial of the motion was justified. The evidence showed that Mrs. Schang aided her husband and another robber to avoid detection by picking them up within a short walking distance of the abandoned getaway car. The only real question was whether from all the circumstances it could be inferred that her participation in the escape was pre-planned. If so, she could be convicted as an aider and abettor; if not, she would be only an accessory after the fact. The court properly left resolution of the question to the jury, since "giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *Curley* v. *United States*, 160 F. 2d 229, 232

(C.A.D.C.), certiorari denied, 331 U.S. 837. While Schang's counsel indicated that he might wish to call Mrs. Schang as a witness if she were acquitted, he never offered any indication of the nature or importance of her possible testimony, and at no point before resting his case did he represent that he was in fact ready to call her to testify if she were acquitted. In these circumstances, petitioner Schang cannot claim prejudice from the court's reservation of its decision.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

JULY 1967.

---

[6] Petitioner Schang raises, but does not argue, the question whether he and his wife should have been granted severances and separate trials (Pet. No. 114, p. 3). That question was not raised in the court below, and hence it is not properly before this Court for consideration. *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16.

U.S. GOVERNMENT PRINTING OFFICE: 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 84

MIKE LA JOY,

v.

UNITED STATES OF AMERICA,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

The Petitioner La Joy considers that matters have occurred which require the attention of the Court, and therefore this reply to the brief of the United States in opposition to the grant of certiorari is necessary.

I.

The Petitioner has argued that the only evidence indicating his presence and participation in the robbery of the bank involved was the claimed voice identification evidence acquired by the unlawful line-up.

Petitioner LaJoy's features and person were never identified by anyone present at the bank, and there is only the claimed identification of his voice by a man who said he heard it once during the stress of a hold-up in which he was admittedly nervous and frightened, and once again in the line-up, and never after that. Other than this, there was no evidence to indicate LaJoy's presence and participation in the crime in the Franklin Park Bank.

Thus, had the District Court decided the Petitioner LaJoy's objections to the line up testimony and properly decided the Motion to Suppress that evidence, LaJoy could not have been convicted. If the Seventh Circuit Court of Appeals had decided his case properly, and in accordance with the law stated by this court in *United States* v. *Wade,* No. 334, October Term 1966, decided June 12, 1967, and *Gilbert* v. *State of California,* No. 223, October Term 1966, also decided June 12, 1967, these proceedings would not exist. Those two lower courts erred on the line-up question, and the United States now seeks to maintain the erroneous judgments of these two lower courts to confine LaJoy for 15 years.

The Government's blithe treatment of the effect of the Wade and Gilbert decisions totally ignores other elements of unlawfulness which entered into the line-up in the case at bar and relies on *Stovall* v. *Denno,* also decided June 12, 1967 as No. 254, October Term 1966. The Government seeks to interpret *Stovall* v. *Denno* as an unreserved ap-

proval and endorsement by this court of every line-up prior to June 12, 1967, without regard for the variations and unlawfulness of such line-ups.

The Petitioner LaJoy therefore reminds the court that his Petition for Certiorari presents additional questions regarding the violation of Rule 9 of the Federal Rules of Criminal Procedure, and the failure to afford LaJoy the opportunity to make bail already fixed by the court upon his indictment, by not informing him that bail had been set. LaJoy, who was established as being a respectable grocer and was arrested in his suburban home at 5:00 A.M. where he and his wife and three children lived, made the very high bail set by the court when given the opportunity. (See Gov. Brief P. 8). Did not the failure to inform him of the order setting his bail, and failure to produce him to persons who could take bail violate LaJoy's Eighth Amendment rights? Of course, a lawyer would secure these rights.

It is respectfully submitted that this court should review the erroneous decision of the Court of Appeals affirming the erroneous decision of the United States District Court.

II.

LaJoy was subjected to the line-up in the case at bar on September 27, 1963. In *Gilbert* v. *State of California*, the line-up occurred March 26, 1964. In *United States* v. *Wade*, the line-up occurred about May 10, 1964.

In all three cases, the denial of counsel after indictment was raised in the District Court and asserted in the respective courts of appeal. LaJoy also raised the additional questions referred to above.

Except for delays caused by court calendar incidents, LaJoy would have been before this court for decision on his application for certiorari before Gilbert and Wade were argued.

If the United States had promptly answered LaJoy's Petition for Certiorari, the question of its grant or denial would have been before this Court approximately a month before *Gilbert, Wade,* and *Stovall* were decided.

LaJoy's Petition was filed in this Court on April 7, 1967. The government sought and obtained, without objection, an extension to June 10, 1967. A further extension was allowed by Mr. Justice Clark, to July 10, 1967. This second extension was obtained on a written application by the Solicitor General stating:

> "The disposition of these cases may well be controlled by this Court's decisions in *Gilbert* v. *California,* No. 223, this Term; *Stovall* v. *Denno,* No. 254, this Term, and *United States* v. *Wade,* No. 334, this Term, to be decided shortly. Once those decisions are rendered, we will be in a position to file promptly an informed response to petitioners' claims that prejudicial error resulted from their being placed in a line-up, without the presence of attorneys to represent them, after their arrests upon indictment but before their presentment for admission to bail under Rule 9(c), F.R.Crim.P.
>
> "Petitioner Tomaszck is now in Illinois custody serving a sentence for a state offense, petitioner D'Argento is, at his own election, serving his federal sentence rather than a concurrent sentence for a state offense, and petitioner LaJoy has been released on bond. There is thus no possibility of personal hardship due to incarceration in the event that petitioners' cases are carried over to the next term.
>
> "The attorneys for petitioners have agreed to this extension."

It is fair to conclude that the parties and counsel for both sides did not conceive that *Stovall* v. *Denno* would deny consideration of any party's constitutional rights, due process or equal justice under law.

However, with bureaucratic imperviousness to the hardship and injustice implicit in its position, the government attempts to forestall consideration of the questions presented here, by reliance upon *Stovall* v. *Denno*, in its Brief in Opposition served on the petitioner's counsel July 12, 1967.

Stovall v. *Denno* really has little in common with the present Petition. It comes to this Court on appeal from rulings on post trial application for habeas corpus. The questions involving line-up were apparently not originally raised at trial or in appeal therefrom. The lineup occurred on August 25, 1961.

In the case at bar, the District Court had the questions presented here squarely before it. The Court of Appeals also heard these questions argued. Each denied relief improperly and contrary to the law, under *Wade* and *Gilbert*.

Whether the identification of a voice but not the person was sufficient and proper evidence on which to base conviction and sentence of fifteen years is implicit and distinguishes this case from all three line-up cases decided June 12, 1967.

III.

With regard to the matter of retrospective application of *Wade* and *Gilbert*, the Petitioner earnestly urges that his unique situation requires reconsideration of the rule of application so that justice may be done.

It is small comfort to him to know that in two out of three cases similar to his, the person denied counsel after indictment secured relief. It is less comfort to realize that government counsel secured two extensions which carried the presentation of his Petition for Certiorari beyond the chance date of June 12, 1967.

The arguments on the validity of the retroactivity are of course recent. The Petitioner would offer the following from *Estes* v. *Texas,* 381 U.S. 532, 14 L.Ed. 2d, 543:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. Such a case was *In re Murchison,* 349 U.S. 133, 99 L.ed. 942, 75 S.Ct. 623 (1955) where Mr. Justice Black for the Court pointed up with his usual clarity and force:
>
> "[13,14] 'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U.S. 11, 14 [99 L.ed. 11, 16, 75 S. Ct. 11].' At 136, 99 L.ed. at 946 (Emphasis supplied.)
>
> "And, as Chief Justice Taft said in *Tumey* v. *Ohio,* 273 U.S. 510, 71 L.ed. 749, 47 S.Ct. 437, 50 A.L.R. 1243, almost 30 years before: 'the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man . . .

to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.' At 532, 71 L. ed. at 758, 50 ALR 1243. (Emphasis supplied.)

"This rule was followed in *Rideau, supra,* and in *Turner* v. *Louisiana,* 379 U.S. 466, 13 L.ed. 2d 424, 85 S.Ct. 546 (1965). In each of these cases, the Court departed from the approach it charted in *Stroble* v. *California,* 343 U.S. 181, 96 L.ed 872, 72 S.Ct. 599 (1952), and in *Irvin* v. *Dowd,* 366 U.S. 717, 6 L.ed. 2d 751, 81 S.Ct. 1639 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L.ed. 2d 799, 83 S.Ct. 792, 93 ALR 2d 733 (1963), and *White* v. *Maryland,* 373 U.S. 59, 10 L.ed 2d 193, 83 S.Ct. 1050 (1963), we applied the same rule, although in different contexts." 381 U.S. 542, 543, 544.

The burden of reconciling a denial of certiorari in this case with appearance of justice, to a man whose sentence of fifteen years depends on a chance date which in effect marks the only difference between lawful and unlawful, constitutional and unconstitutional, fair and unfair, is beyond the ability of his counsel.

CONCLUSION

The Petitioner requests the grant of the Writ of Certiorari as prayed in his Petition.

Respectfully submitted,

MAURICE J. WALSH
Attorney for Petitioner

SUPREME COURT, U. S.

Nos. 81, 84, and 114

AUG 31 1967

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1967

GERALD TOMASZCK AND JOSEPH D'ARGENTO, PETITIONERS

v.

UNITED STATES OF AMERICA

MIKE LAJOY, PETITIONER

v.

UNITED STATES OF AMERICA

PATRICK SCHANG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR DEFENDANTS GERALD TOMASZCK and JOSEPH D'ARGENTO ONLY

FRANK G. WHALEN
111 West Washington Street
Chicago, Illinois 60602
Attorney for Petitioners
Gerald Tomaszck and Joseph D'Argento

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

PAGE

CITATIONS

Cases:

Stovall v. *Denno*, 18 L.Ed. 1195 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 81

GERALD TOMASZCK AND JOSEPH D'ARGENTO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 84

MIKE LAJOY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 114

PATRICK SCHANG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR DEFENDANTS GERALD TOMASZCK and JOSEPH D'ARGENTO ONLY

II.

THE COMPULSORY EXHIBITION OF THE PERSONS AND VOICES OF DEFENDANTS TOMASZCK AND D'ARGENTO IN A LINEUP FOLLOWING A SUPPRESSED INDICTMENT PURSUANT TO THE GOVERNMENT'S PLANS TO CONDUCT IT SO THAT ATTORNEYS WOULD NOT BE GIVEN AN OPPORTUNITY TO ATTEND VIOLATED DEFENDANTS' RIGHTS TO THE EFFECTIVE AID OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Defendants Tomaszck and D'Argento argued that the pretrial and in trial identifications were so tainted that their rights were violated not only under the Sixth Amendment but under the Fourteenth Amendment (Pet. Cert. 2, 10).

Stovall v. *Denno*, 18 L.Ed. 1195, forecloses their claim of violation of the Sixth Amendment, but re-emphasizes that the lineup may be so conducted as to violate a person's *rights* under the *due* process clause of the Fourteenth Amendment.

Illustrative that "the confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law" (Stovall, p. 1206) is the testimony of the Government's witness, Adele Smith. When viewing Tomaszck at the lineup she placed a "question mark" on her card (Tr. 2844), that the reason she placed the "question mark" on the card was that as far as she knew there might be 489,000 people in Chicago who more nearly represented or looked like that individual than the one she picked out and that all she understood to do was to pick out who more nearly resembled the individual from those present in the line (Tr. 2862), that she could not positively

say that Tomaszck was the man who crossed her lawn (Tr. 2859), and the "question mark" stayed on her card because the man walked past her window a little too fast to make her positive of anything (Tr. 2874), and that although she told the agent the man looked about 38, that Tomaszck does not look 38 years of age (Tr. 2877). Nevertheless, this witness when testifying in Court on direct examination pointed out the defendant Tomaszck and identified him as the man she had seen outside her window (Tr. 2834) while talking on the telephone (Tr. 2826).

Government's witness Beck before going to the lineup was not told he was to view possible suspects, he was told that he was to view persons who had already been indicted (Tr. 389).

Government witness Hauger stated between 11:45 a.m. and 12:00 p.m. she did see a man walking south on Dora, on the east side of Dora, in front of her house who was not walking hurriedly (A. 27-28). She then saw this man walk east on Minneapolis while she was preparing lunch and only saw the profile of the man (A. 28). The following day when shown pictures of Tomaszck by agents she could not describe, she said that the pictures resembled the man she saw walking by her home (A. 28). While being transported to the showup four days later she was told by the agents that arrests had been made and she might have been told that some people were indicted (A. 28).

The purported identifications of Tomaszck were made under circumstances so unfair as to deny him due process of law guaranteed by the Fourteenth Amendment.

CONCLUSION

For the reasons advanced defendants Gerald Tomaszck and Joseph D'Argento request that the judgments entered as to these defendants be reversed.

Respectfully submitted,

FRANK G. WHALEN
111 West Washington Street
Chicago, Illinois 60602
Attorney for Petitioners,
Gerald Tomaszck and
Joseph D'Argento.